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STREET RAILWAY REPORTS

ANNOTATED

(Cited St. Ry. Rep.)

REPORTING THE

ELECTRIC RAILWAY AND STREET RAILWAY DECISIONS

OF THE

FEDERAL AND STATE COURTS

IN THE

UNITED STATES.

EDITED BY

FRANK B. GILBERT,

OF THE ALBANY BAR.

VOL. II.

ALBANY, N. Y.
MATTHEW BENDER.

1904.

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VOLUME II.

Montgomery Street Railway v. Hastings.

(Alabama — Supreme Court.)

1. **COLLISION WITH VEHICLE ON TRACK; CONTRIBUTORY NEGLIGENCE.**— It is not negligence as a matter of law for a driver to stop a buggy so that the rear wheels thereof are within a few feet of a street car track; it is not contributory negligence as a matter of law to drive a horse which is afraid of street cars on a narrow street in which there is a railway track.¹
2. **EVIDENCE AS TO INJURY TO HORSE.**— It is competent to show the value of the horse before a collision and that soon after, the estimates taking into account the change in the disposition of the horse. Evidence that before the collision the horse was docile and after the collision wild and vicious is admissible.

APPEAL by defendant from judgment for plaintiff. Decided November 13, 1903. Reported 138 Ala. 432, 35 So. 412.

C. H. Roquemore and *Lomox, Crunn & Weil*, for appellant.

Watts, Troy & Caffey, Thos. H. Watts, & P. C. Massie, for appellee.

Opinion by **McClellan, C. J.**

No exception appears to have been reserved to ruling on defendant's motion to strike certain averments of the complaint.

The assignment of error based upon the overruling of the demurrers to the complaint is not supported by argument or cita-

1. It is not contributory negligence as a matter of law for a person to drive a horse which is afraid of electric street railway cars upon a street occupied by an electric railway, although the space between the track and the street curbing is narrow. *Gibbons v. Wilkesbarre & S. St. Ry. Co.*, 155 Pa. St. 279, 26 Atl. 417. A skilled driver is not guilty of contributory negligence as a matter of law, in failing to turn off upon a side street upon seeing that his

tion of authorities in the brief, and, the complaint stating a cause of action, that ruling of the trial court need not be reviewed. We will say, however, that we are not impressed that any of the grounds of the demurrers were well taken.

The second plea avers that the person in charge of the horse and buggy was guilty of negligence which proximately contributed to the injury to them complained of, and then particularizes facts as constituting this alleged contributory negligence which in themselves do not constitute negligence at all. It can by no means be affirmed that to stop a buggy in a street off the track of a street railway, with "the hind wheel thereof within a few feet of the

horse, which is but four years old, is frightened by a moving electric car. *Flewelling v. Lewiston & A. H. R. Co.*, 89 Me. 585, 36 Atl. 1056. The fact that the driver could have traveled on some other street than that on which the defendant's car tracks were laid does not make him guilty of contributory negligence precluding recovery, where he had no reason to believe that his horses would become unmanageable at the sight of the engine and cars. *Muncie St. Ry. Co. v. Maynard*, 5 Ind. App. 372, 32 N. E. 343.

But in the case of *Cornell v. Detroit Elec. Ry. Co.*, 82 Mich. 495, 46 N. W. 791, 3 Am. Electl. Cas. 486, it appeared that the plaintiff was driving a young horse which he knew to be unaccustomed to electric cars; for the purpose of testing the horse he drove him where he knew electric cars would be met. It was held that he was guilty of contributory negligence precluding recovery against the railway company for injuries sustained by his horse taking fright at the cars. The court said: "He knew the danger of his horse becoming frightened and yet he took him into this dangerous place knowing that the cars were coming. There was ample opportunity for him to have turned into another street where there was less danger in subjecting his horse to the sight of the cars. It was also admitted upon the hearing that there were other streets by which he might have reached his destination. It is common knowledge that such vehicles when first seen in motion have a tendency to frighten animals. When one deliberately drives into such a place as this, with full knowledge of the situation and danger, for the express purpose of testing his horse, he is guilty of contributory negligence and is not entitled to recover." See also *Nellis Street Railroad Accident Law*, § 20.

As to injuries resulting from horses frightened at street railway cars, and the liability of street railway companies therefor, see *Indianapolis & Greenfield R. T. Co. v. Haines*, 2 St. Ry. Rep. 206, (Ind. Sup.) 69 N. E. 187; *Adsit v. Catskill Elec. Ry. Co.*, 2 St. Ry. Rep. 785, 88 App. Div. (N. Y.) 167, 84 N. Y. Supp. 393; *Lincoln Traction Co. v. Moore*, 2 St. Ry. Rep. 642, (Nebr.) 97 N. W. 605, and monographic note on p. 643; *Knoxville Traction Co. v. Mullens*, 2 St. Ry. Rep. 875, (Tenn.) 76 S. W. 890; *Romine v. San Antonio Traction Co.*, 2 St. Ry. Rep. 898, (Tex. Civ. App.) 77 S. W. 35.

track," the driver being in the buggy, is negligence on the driver's part. This is the fact averred as the basis for the conclusion averred of contributory negligence. It does not support the conclusion. The plea in effect avers that this conduct on the part of the person in charge of the horse and buggy was negligence *per se*, as matter of law. It was not, and the plea was properly held bad on demurrer.

Similarly, the fifth plea avers facts as contributory negligence on the part of the person in the buggy which do not import negligence. It cannot be said, as matter of law, to be negligence, contributing to an injury suffered in a collision with a street car, to drive a horse which is "afraid or skittish of the street car" on a narrow street in which there is a railway track. The further averment in this plea, as to the motorman's efforts to stop the car after the vehicle was actually on the track, was provable under the general issue.

Plea 6 also fails to aver contributory negligence on the part of the driver, and all it does aver material to the case was within the general issue presented by the plea of not guilty.

The injury complained of was sustained in November, 1900. There was evidence tending to show that before and up to the time of the collision the horse was docile, not afraid of cars, etc., and also that after the collision it was of an ill disposition, very afraid of cars, difficult to drive near cars, given to backing and attempting to kick and run when approaching cars, and when cars were approaching him, etc., etc. No cause for this change in the animal other than the collision in question was suggested in the evidence. The jury had a right to find that the change was due to the collision. To afford them a basis for the assessment of damages referable to this impairment of the animal's usefulness, it was entirely competent to show what the value was recently before and soon after the collision, the estimates taking its change of disposition into account. The condition of gentleness before, and the condition of wildness and viciousness afterward, were each and both in the nature of continuing conditions. Evidence of the former condition a month or two before the collision and the value of the animal at the time was competent, especially in connection with evidence given by other witnesses that such

condition continued up to the time of the collision; and so, too, evidence that it was wild two or three months after the collision, and of the depreciation of its value at that time in consequence, was properly received, especially in view of other evidence that this latter condition had existed ever since the collision. Indeed, the abstract fact that the condition of wildness and viciousness continued for several months, and still obtained the following spring, was, of itself, pertinent to the inquiry of deterioration in its value, and witnesses were properly allowed to give their estimates of its value at that time, taking its then disposition into account, and also the fact of its continuation from the injury to that time.

The objection to the witness Bolling testifying that the fact of a cut which he had described being in the horse's side injured its market value, proceeding on the ground that the witness was not an expert, was not well taken. *Ward v. Reynolds*, 32 Ala. 384; *A. G. S. R. Co. v. Moody*, 92 Ala. 279, 9 So. 238.

The objection to the question: "What was the horse worth before it was injured?" propounded to the plaintiff, was hypercritical. To all ordinary apprehension, this called for an opinion as to the market value.

The defendant was allowed to prove the cost of repairs to the buggy, and there was no dispute as to the amount of it. If the court erred in not allowing this proof to be made by the witness Hastings, the error could not have prejudiced the defendant.

The witness Thomas, the motorman, having testified, by way of stating it as a conclusion and otherwise, that he had exercised every possible care to avoid the collision, it was competent, for the purpose of laying a predicate for his impeachment, to ask him if he had not told Mrs. Hastings, immediately after the collision, that it would not have happened if he had been more careful. This statement, if made, was in conflict with his testimony on the trial, and proof of it went to his credibility.

There was no question in the case as to the buggy becoming "second-handed" through and by reason of the injuries it received in the collision. It was not a new buggy at the time of the collision. The plaintiff had owned and used it for several months, and it was a second-hand buggy when he bought it, i. e.,

it had already been used for some time. The collision, therefore, had nothing to do with making it second-handed, and its consequent depreciation in value. It was entirely impertinent, therefore, to ask the witness Geible the question: "Is it not true that when an article becomes second-handed it loses much?" and his answer, "It certainly does," was not relevant to any issue in the case. Having in view the connection in which the question was asked, and it may be that it was intended to elicit evidence upon the inquiry whether an article which has been broken and repaired is not less valuable than it was originally, but this is mere speculation as to what may have been intended by the question. On its face it imports no reference to a repaired article, and it seems clear that the witness understood it to have reference to the relative market value of such an article as a buggy when new and unused, on the one hand, and after it has been used and becomes second-handed, on the other. The testimony was inadmissible, and we are unable to affirm that its admission did not prejudice the defendant.

We find no error in the rulings of the court on defendant's requests for instructions.

Reversed and remanded.

Birmingham Railway, Light & Power Co. v. Mullen.

(Alabama — Supreme Court.)

1. ASSAULT AND BATTERY BY CONDUCTOR;¹ EVIDENCE AS TO LANGUAGE OF CONDUCTOR.—In an action brought to recover for an assault and battery committed by a conductor upon a passenger, evidence as to profane language used by the conductor to one of the plaintiff's companions was held admissible as part of the *res gestæ*.

1. Assault upon passenger by employee.—See note to Birmingham Ry. & Elec. Co. v. Mason, 1 St. Ry. Rep. 1, 137 Ala. 342, 34 So. 270. See also in this volume Foster v. Atlanta R. T. Co., 2 St. Ry. Rep. 75, 119 Ga. 675, 46 S. E. 840; Sonnen v. St. Louis Transit Co., 2 St. Ry. Rep. 632, (Mo. App.) 76 S. W. 691; Freedman v. Metropolitan St. Ry. Co., 2 St. Ry. Rep. 802, 89 App. Div. (N. Y.) 486, 85 N. Y. Supp. 986.

2. **EVIDENCE AS TO AGE AND RELATIVE SIZES OF PARTIES.**—It is competent for the plaintiff to prove in such an action the age, height, and weight of the plaintiff, since the jury might well consider the relative age and the relative sizes of the parties in connection with the evidence tending to show that the conductor assaulted the plaintiff.
3. **EVIDENCE AS TO CONDUCT OF PLAINTIFF.**—It being charged by the defendant that the plaintiff used profane language to the conductor, it is competent for a witness to answer a question as to whether if the plaintiff made the remark he, the witness, could have heard it, or was close enough to have heard it.
4. **JUSTIFICATION OF ASSAULT.**²—Abusive language or opprobrious epithets used by a passenger do not justify the commission of an assault upon him by a conductor. The burden is on the defendant to justify the assault and to show that it was necessary. The honest, but mistaken, belief of the conductor that it was justified does not exempt the defendant from liability. In ejecting a passenger the conductor has no right to strike him unless in self-defense, and it is for the jury to determine from all the facts if the assault was proper in an effort to eject.

APPEAL by defendant from judgment for plaintiff. Decided December 17, 1903. Reported 138 Ala. 614, 35 So. 701.

The plaintiff introduced evidence tending to show that on the night of November 2, 1901, he, together with Bryan Crumpton and one or two other boys, boarded one of the defendant's street cars to go from Birmingham to East Lake, the place of plaintiff's residence; that he paid his fare and took a

2. **Justification of assault.**—If the employee of a street railway company acts only in justifiable self-defense as against an assault by a passenger the company is not liable. *Hayes v. St. Louis R. T. Co.*, 15 Mo. App. 583. So where in an action brought by a passenger to recover damages from a railroad company because of an alleged assault committed by a conductor it appeared from the evidence that the plaintiff was disorderly, that he struck the first blow, and that the conductor used no unnecessary force, a verdict for the passenger should be set aside. *Russell v. N. Y. C. & H. R. R. Co.*, 12 App. Div. (N. Y.) 160, 42 N. Y. Supp. 678. And where it appeared that the plaintiff while a passenger on one of the street cars of the defendant got upon the front platform and commenced an altercation with the driver, using language which was very abusive and insulting, and calculated to bring about a personal encounter, which result followed to the injury of the plaintiff, the plaintiff was held not to be entitled to a verdict. *Scott v. Central Park, etc., R. Co.*, 53 Hun (N. Y.), 414, 6 N. Y. Supp. 382. See also *Moore v. Columbia, etc., R. Co.*, 38 S. C. 1, 16 S. E. 781; *New Orleans, etc., R. Co. v. Jopes*, 142 U. S. 18, 12 Sup. Ct. 109. But insulting language is not of itself sufficient justification for an assault upon a passenger by an employee. *Birmingham Ry. & Elec. Co. v. Baird*, 130 Ala. 334, 30 So. 456, 54 L. R. A. 752; *Hanson*

seat in the car; that Crumpton was standing near the rear platform of the car; that Crumpton had been drinking and was using abusive language; that some one rang the bell of the car for it to stop; that the conductor came back to where Crumpton was standing and accused him of having rung the bell; upon Crumpton saying that he did not ring the bell, the conductor called him a d—n liar; that after a short dispute, the conductor started back toward the front end of the car and when Crumpton continued to curse, he came back and told him that he must stop cursing or he would put him off the car; that Mullen, the plaintiff, who was sitting near Crumpton, remarked that, if he tried to put Crumpton off, he would have to put two off, to which remark the conductor replied that that would be easy to do; that

v. Urbana, etc., Elec. St. Ry. Co., 75 Ill. App. 474; *Baltimore & Ohio R. Co. v. Barger*, 80 Md. 23, 30 Atl. 560, 45 Am. St. Rep. 319 (in which case it was held that a railroad company is liable for an assault made by its conductor upon a passenger, although the assault is provoked by profane and abusive language used by the passenger to the conductor without provocation); *Haman v. Omaha Horse Ry. Co.*, 35 Nebr. 74, 52 N. W. 830; *Weber v. Brooklyn, Queens County & Sub. R. Co.*, 47 App. Div. (N. Y.) 306, 62 N. Y. Supp. 1 (in which case it appeared that a passenger on a street car left his seat and went to the platform to remonstrate with the conductor for what he conceived to be the conductor's abusive treatment of an intoxicated passenger; in so remonstrating he used indecent, insulting, and provoking language; it was held that such language did not justify the conductor's assault, or prevent the passenger from recovering from the railroad company the damages occasioned).

A passenger who uses obscene, profane, or vulgar language and is otherwise disorderly has no right to remain on a train, either with or without a ticket, and a conductor is justified in ejecting him. If both the passenger and the conductor are armed and in the altercation the passenger uses insulting and profane language for the purpose of inducing an assault upon him by the conductor, and he is injured in the shooting which ensues, he cannot recover from the company for such injuries. *Peavy v. Georgia Railroad & Banking Co.*, 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334. See also *City Electric Ry. Co. v. Shropshire*, 101 Ga. 33, 28 S. E. 508.

The fact that the passenger is refusing to comply with a regulation of the carrier will not justify the servant in using unnecessary violence to compel an observance of the regulation. *Hanson v. European & N. A. Ry. Co.*, 62 Me. 84, 16 Am. Rep. 404.

The mere fact that the passenger on a railroad train is intoxicated and disorderly does not justify a trainman in inflicting personal violence upon him. *Illinois Cent. R. Co. v. Sheehan*, 29 Ill. App. 90.

In the case of *Birmingham Ry. & Elec. Co. v. Baird*, 130 Ala. 334, 30 So. 456, 89 Am. St. Rep. 43, upon which the court in the principal case depends for its ruling, the court said in treating of the justification for an assault by a railway employee upon a passenger: "Of course, a conductor has the

the conductor then started toward the front of the car again, whereupon the plaintiff, Mullen, turned to Crumpton and asked him to hush, saying that "if he did not hush up the conductor might not have any better sense than to try and put him off;" that thereupon the conductor turned, and, after saying to Mullen, "Haven't I got any better sense than that?" he threw his arms around Mullen's neck and struck him two or three times in the face. At the time this assault was made, Mullen was still sitting down, and had made no demonstration toward the conductor.

right of self-defense against the assault of a passenger; but the right is the same in this connection as in criminal law. He must be imperiled, and he must be without fault. To be sure, he need not retreat from his car. He may assault a passenger, when necessary to protect other passengers from assault, using no more than necessary force, and this may become a duty,—indeed, it is a duty whenever it is a right. But he cannot assault a passenger in retaliation for an assault committed upon himself, or upon another passenger, and, *a fortiori*, he cannot assault a passenger for abusive words, or in revenge, or punishment, under any circumstances. And if he does assault a passenger otherwise than under a necessity to defend himself or a passenger from battery, or in rightfully ejecting a passenger who by his conduct toward other passengers has forfeited his right of carriage, the carrier is liable. The fault of the passenger short of producing a necessity to strike in self-defense will neither justify the conductor in striking, nor relieve the carrier from liability for his act." The determination of the question as to whether or not a carrier is relieved from liability for an assault by one of its employees upon a passenger who is guilty of using profane and insulting language is made to depend in the case last cited, and in other cases, upon the question as to whether the conduct of the passenger was such as to justify the assault as a means of self-defense, or as a means of protecting the rights of other passengers which were prejudiced by such conduct. As was said by the court in the case of Baltimore, etc., R. Co. v. Barger, 80 Md. 23, 45 Am. St. Rep. 319, 30 Atl. 560: "The plaintiff was at the time of the assault a passenger on the train which was in charge of this conductor, who was the agent of the company to see, as far as he reasonably could, that the plaintiff and other passengers were properly treated and carried to their respective points of destination. If the plaintiff persisted in misbehaving on the train, either by the use of foul and abusive language toward the conductor, or in any other way calculated to frighten or materially interfere with the comfort and safety of the other passengers, after being admonished by the conductor, the latter would have been justified in ejecting him from the train. The remedy in such a case would be to eject an unruly passenger,—not to assault him and then let the employer escape all liability because he, the conductor, was carrying out a personal purpose and feeling. A conductor of a train doubtless has his patience and forbearance severely tested at times; but he must not settle his own personal difficulties with passengers, any more than he should permit others to do so when he could avoid it."

The plaintiff introduced evidence tending to show that his face was still injured by the blows inflicted by the conductor.

The defendant introduced testimony tending to show that the plaintiff was using loud and boisterous language, and had, prior to the conductor's taking hold of him, cursed the conductor; that the conductor stated to him and Crumpton that, if they did not hush cursing and stop that boisterous conduct, he would have to put them off; that as the conductor turned from the plaintiff, the plaintiff said: "The d——n fool hasn't got sense enough to run a car nohow." That thereupon the conductor said he had sense enough to put the plaintiff off, and, upon giving the signal to have the car stopped, he caught hold of Mullen by his coat to put him off; that thereupon several persons jumped on his back; that the conductor asked another employee of the defendant to take the boys off his back, and the disturbance then quieted down; that Mullen, the plaintiff, spoke up and said his hat had blown out of the window, and asked to be let off to get his hat; and that when the car stopped at the next station Mullen did get off and get his hat.

During the examination of several of the witnesses, the plaintiff asked them what was the age, height, and weight of the plaintiff at the time of the difficulty with the defendant's conductor, and also asked several witnesses as to what was the age, height, and weight of Jones, the conductor, who was alleged to have assaulted the plaintiff. To each of the questions in reference to these several matters, the defendant separately objected, and separately excepted to the court's overruling its objection. The defendant also separately moved to exclude each of the answers going to show the age, height, and weight of the plaintiff and Conductor Jones, and separately excepted to the court overruling each of such motions. These rulings constitute the bases of the assignments of error numbered from 3 to 10, inclusive.

G. I. McDonald, who had been examined as a witness for the plaintiff, was introduced as a witness, and in rebuttal was asked the following question by the plaintiff's counsel: "Did Mullen say that Jones was such a d——n fool he could not run a train?" The defendant objected to this question as not being in rebuttal. The court overruled the objection and the defendant duly excepted. The witness answered, "No, sir, he did not." The ruling of the court in overruling the defendant's objection to this question, constitutes the basis of the eleventh assignment of error.

The plaintiff introduced one J. Smith as a witness in rebuttal, who testified that if the plaintiff had said that the conductor, Jones, was "such a d——n fool he didn't know how to run or could not run a train, he, the witness, did not hear it;" thereupon the witness was asked the following question: "Could you have heard it, were you close enough to have heard it?" The defendant objected to this question, the court overruled the objection, and the defendant duly excepted. The witness answered that he was close enough to have heard it. The other facts relating to the other rulings of the court upon the evidence, as reviewed on the present appeal, are sufficiently shown in the opinion.

The court, at the request of the plaintiff, gave to the jury the following

written charges: "(10) I charge you, gentlemen of the jury, that abusive language or opprobrious epithets alone never justify the commission of an assault by a conductor in charge of a train upon a passenger. (11) I charge you, gentlemen of the jury, that if you believe from the evidence that the defendant's conductor struck the plaintiff, then your verdict must be in favor of the plaintiff, unless you further find from the evidence that the said conductor struck the plaintiff in self-defense or to save himself from bodily harm."

The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following charges requested by it: "(1) If you believe from the evidence that the plaintiff is entitled to damages, but believe that nominal damages would be all the plaintiff should have, because of mitigating circumstances, you are authorized to award him only nominal damages. (2) The undisputed evidence shows that Crumpton was drunk and using profane language, and I now charge you if you believe from the evidence that when the conductor threatened to put Crumpton off the car for using such language, the plaintiff then, by his language or conduct, encouraged Crumpton to continue using such profane language, you can consider such encouragement in mitigation of any damages you may consider the plaintiff is entitled to. (3) If you believe from the evidence that the plaintiff encouraged a drunken passenger to continue using profane language, for the use of which the conductor threatened to eject such passenger, I charge you, you have the right to consider this in connection with all the other evidence in the case in mitigation of any fault you may find the conductor committed, if you believe from the evidence the conductor committed any fault. (4) If you believe from the evidence that the plaintiff encouraged, aided, and abetted a drunken passenger to continue using profane language, for the use of which the conductor threatened to eject such drunken passenger, and if you further believe from the evidence the conductor then attempted to eject the plaintiff, because of such aid and encouragement, and that whatever force the conductor used was used in an honest and proper effort to put the plaintiff off the car, you must find for the defendant. (5) If you believe from the evidence that Crumpton was drunk, that he was using profane language, that the conductor threatened to put Crumpton off the car for using such language, that when the conductor threatened to put Crumpton off the car, the plaintiff said to the conductor, 'If you put Crumpton off, you will have to put me off,' you have the right to consider this in mitigation of any fault you may determine the conductor may have committed, if you find he was in fault. (6) If you believe from the evidence that Crumpton was cursing while a passenger on the car; that the conductor told Crumpton he would put him off the car, if he did not stop cursing; that Crumpton continued to curse, and the conductor then threatened to put Crumpton off the car for cursing; that, when the conductor threatened to put Crumpton off the car for cursing, the plaintiff said to the conductor, in substance, 'If you put Crumpton off, you will have to put me off;' that the conductor then said to the plaintiff, in sub-

stance, 'That would be an easy thing to do;' that the plaintiff then said, in substance, in the presence and hearing of the conductor, 'The damn fool has not sense enough to run a car anyhow;' that the conductor then took steps to stop the car, and put his hand on plaintiff to eject him from the car, and that the conductor used no more force than would be necessary in a proper and reasonable effort to eject the plaintiff from the car, after the car had been brought to a stop — you must find for the defendant. (7) If you believe from the evidence that Crumpton was cursing on the car; that the conductor told Crumpton to quit cursing; that Crumpton continued to curse; that the conductor threatened to put Crumpton off the car, if he did not quit cursing; that when the conductor made this threat the plaintiff said, in substance, to the conductor, 'If you put Crumpton off you will have to put me off;' that the conductor then said to the plaintiff, in substance, 'That would be an easy thing to do;' that the plaintiff then said, in substance, in the presence and hearing of the conductor, 'That conductor may not have any more sense than to try to put us off;' that the conductor then rang the bell to stop the train, and, while the train was slowing up to stop, the conductor took hold of the plaintiff to put him off the car, and used no more force than was necessary in a reasonable and proper effort to eject the plaintiff — you must find for the defendant. (8) If you believe from the evidence that Crumpton was cursing on the car; that the conductor told Crumpton to quit cursing; that Crumpton continued to curse; that the conductor told Crumpton he would put him off the car if he did not quit cursing; that the plaintiff then said to the conductor, 'If you put Crumpton off, you will have to put me off;' that the plaintiff, by the use of such language, intended to encourage Crumpton not to quit cursing; that the plaintiff also said in the presence and hearing of the conductor, 'He may not have any more sense than to put us off;' that the plaintiff, by the use of such language, intended to encourage Crumpton to continue cursing — you can, in connection with all the other evidence in this case, look to such encouragement in mitigation of any fault you may find the conductor committed. (9) Any encouragement you may find the plaintiff gave to Crumpton to misbehave or curse upon the car, if you find from the evidence the plaintiff did so encourage, can be looked to by you in extenuation and mitigation of any fault you may find the conductor committed."

The jury returned a verdict in favor of the plaintiff assessing his damages at \$900. Thereupon the defendant moved the court to set aside the verdict and grant it a new trial, upon the grounds that the verdict of the jury was contrary to the weight of the evidence; that the damages assessed by the jury were excessive; that the court erred in refusing to give each of the charges requested by the defendant, and in giving the charges requested by the plaintiff. The court overruled this motion, and the defendant duly excepted.

There was judgment in favor of the plaintiff, assessing his damages at \$900. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Walker, Tillman, Campbell & Walker, for appellant.

A. O. Lane and F. S. White, for appellee.

Opinion by HARALSON, J.

1. The witness McDonald, for the plaintiff, had testified, that he witnessed the alleged assault on the plaintiff by the conductor; that it grew out of the conduct of one Crumpton, who appeared to be drunk, and who was traveling as a passenger in company with the plaintiff and others. The conductor had threatened to eject Crumpton from the car, on account of the profane language he was using, when plaintiff said to the conductor: "If you try to put him off, you will have to put both of us off." The conductor had also charged Crumpton with having pulled the bell cord, which Crumpton denied, and the witness stated, over objection by defendant, that the conductor replied, that "he was a d——n liar, he did do it." The plaintiff's counsel asked the witness,—“How many times, if at all, did the conductor curse in talking to Crumpton?” to which question, defendant objected as calling for immaterial evidence. The evidence was part of the *res gestæ* of the alleged assault, and what was said and done by each of the parties to the transaction was legitimate to be stated.

2. Assignments of error from 3 to 10 inclusive, related to the same matter—whether it was competent for plaintiff to prove the age, height, and weight of plaintiff which was allowed to be done. Apart from any effort to put the plaintiff off the train and in connection with the evidence tending to show that the conductor assaulted him, the jury might well consider the age and relative sizes of the parties. *Thomason v. Gray*, 82 Ala. 292, 3 So. 38; *Wilkins v. State*, 98 Ala. 2, 13 So. 312.

3. The objection to the question, the basis of the assignment of error 11, was that the question was not in rebuttal, to anything brought out by defendant. It was within the discretion of the court to allow it. Besides, it was in rebuttal. The defendant had asked the witness Cheek, on cross, if he had not heard the plaintiff say the conductor did not have sense enough to run the car—the same matter about which the witness McDonald was interrogated in rebuttal by plaintiff.

4. Smith, for plaintiff, in rebuttal, testified, that he was present at the difficulty. The attempt was made by defendant, to show that plaintiff said the conductor was such a d——n fool he did not know how to run a train. He was asked by the plaintiff, if plaintiff made the remark, that he, the witness, could have heard it, or was close enough to have heard it. The defendant made a general objection to the question. It was competent for the witness to answer it. *McVay v. State*, 100 Ala. 111, 14 So. 862; *A. G. S. R. Co. v. Linn*, 103 Ala. 135, 15 So. 508.

5. There was no error in the charge of the court for plaintiff numbered 10 — that abusive language or opprobrious epithets alone never justify the commission of an assault by a conductor of a train upon a passenger. This was declared to be the law in *B. R. & E. Co. v. Baird*, 130 Ala. 350, 30 So. 456, 54 L. R. A. 752, 89 Am. St. Rep. 43. Nor was there anything of which the defendant could complain in giving the one for plaintiff, numbered 11.

6. Charge 1 refused for defendant seems to assume that there were mitigating circumstances in the assault alleged to have been committed by the conductor, and for this was properly refused.

7. Charges 2 and 3 requested by defendant were properly refused. They seem to assume and instruct the jury as a fact, that Crumpton was drunk. The evidence is very persuasive that he was drunk, but there was evidence of tendencies such as made it proper for that fact to have been left to the jury. Smith, who was present, testified to the fact that Crumpton was under the influence of liquor. He said: "He had been drinking — he wasn't drunk. * * * I cannot tell he was drunk, but I can tell he was under the influence of liquor." J. F. Chitwood, who was also present and saw the crowd plaintiff was with, testified: "I cannot say whether any of them were drunk. They were looking pretty lively, after I got on the car, but after the racket was over, they did not talk like they were drunk." If the tendencies of the evidence to show that Crumpton was not drunk, were weak, as compared with other evidence that he was, the fact, whether he was drunk or not, as we have said, was for the jury to determine. These charges were properly refused, for this reason, as well as for other faults not noticed.

John Campbell & Walker, for appellant.

J. S. White, for appellee.

Witness by HARRISON, J.

The witness McDonald, for the plaintiff, had testified that he saw the alleged assault on the plaintiff by the conductor of the car, and who was traveling as a passenger with the plaintiff and others. The conductor had the plaintiff and Crumpton from the car, on account of the plaintiff saying he was going when plaintiff said to the conductor, "you will have to put both of us off." Crumpton denied, and the witness stated, over a question, that the conductor replied, that "he would not do it." The plaintiff's counsel asked the witness, "How many times, if at all, did the conductor say to Crumpton, 'you will have to put both of us off'?" to which question, defendant objected on the ground that the evidence was part of the alleged assault, and what was said and done in the presence of the parties was legitimate to be shown.

The assignment of error from 3 to 10 inclusive, relate to the same matter — whether it was competent for plaintiff to introduce evidence of the plaintiff's height and weight in rebuttal. Apart from any effort to put the plaintiff off the car in connection with the evidence tending to show that the conductor assaulted him, the jury might well consider the relative sizes of the parties. *Thomason v. Gray*, 82 Ala. 312; *Walker v. State*, 98 Ala. 2, 13 So. 312.

3. The objection to the question, the basis of the assignment of error 11, was that the question was not in rebuttal, being brought out by defendant. It was within the discretion of the court to allow it. Besides, it was in rebuttal. The witness Cheek, on cross, if he had not asked the witness Crumpton did not have sense enough to say the conductor did not have sense enough to get out of the car — the same matter about which the witness McDonald was interrogated in rebuttal by plaintiff.

plaintiff, in rebuttal, testified that he was present.

The attempt was made by defendant to show that the conductor was not a fellow traveler on a train. He was asked by the plaintiff, in rebuttal, mark, that he, the witness, could have been enough to have seen it. The defendant made a to the question. It was competent for the witness to testify. *McVay v. State*, 100 Ala. 111, 14 S. 201. *v. Linn*, 100 Ala. 131, 14 S. 508.

no error in the charge of the court for failing to state that abusive language or opposition to the conductor by a passenger is a crime. This was stated to be the law in *v. Baird*, 130 Ala. 65, 6 S. 456, 54 L. R. A. 111.

Rep. 43. Nor was there anything of which the defendant complained in the charge for failing to

refused for defendant to assume the burden of proof in the circumstance. It is well settled that the conductor, as a fellow traveler, is properly regarded as a witness, and 3 requests for a ruling were properly made. It is not for the jury to assume that the witness was drunk. The evidence was persuasive that there was evidence of drunkenness such as to be a fact to have been testified to the jury. Such a ruling was error. He testified that the witness was drunk.

* * * * *
for the influence of the witness and saw him whether any other witness after I got out of the car at talk like the witness. If the witness was not drunk, the fact was not, as the witness argues were the faults no

8. Charge 4 is subject to the same vice. Moreover, it directs that the assault, which plaintiff's evidence tends to show was committed, was proper, if used in an honest and proper effort to eject plaintiff from the car. The burden was on the defendant to justify the assault, and to show that it was necessary; and if the conductor honestly but mistakenly supposed he was justified, this would not exempt the defendant from liability. As we have said, he had no right to strike the plaintiff in ejecting him from the car, unless it was necessary to defend himself from an assault first made upon him, and it was for the jury to determine, from all the facts, if the assault was proper in an effort to eject plaintiff. The charge falls short of these wholesome principles. *B. R. & E. Co. v. Baird, supra.*

9. Charge 5 was properly refused. It was argumentative, and instructed as a justification for the assault (which the conductor was prohibited from making, except to defend himself from an assault first made by plaintiff on him), the words alleged to have been used by plaintiff, viz.: "If you put Crumpton off you will have to put me off." These words, if used by plaintiff, did not justify an assault by the conductor on him, neither for making it, nor to mitigate damages therefor.

For the same reason, and from what has been said above, charges 6, 7, 8, and 9 were properly refused.

We have examined the evidence in the case, and are unable to conclude that the court erred in refusing the motion for a new trial, on any of the grounds for which it was asked.

Affirmed.

Anniston Electric & Gas Co. v. Hewitt.

(Alabama — Supreme Court.)

COLLISION WITH CATTLE ON TRACK; LIABILITY FOR INJURY.¹—It is the duty of a motorman operating an electric car to keep a lookout for live stock, and not to run his car at such a rate of speed that he could not stop it within the distance required to prevent collision. This rule is subject to

1. As to liability of street railway companies for injury to cattle on track, see *Ensley v. Detroit United Ry. Co.*, 1 St. Ry. Rep. 380, (Mich.) 96 N. W. 34; *Kotila v. Houghton County St. Ry. Co.*, 1 St. Ry. Rep. 397,

the qualification that if an animal come suddenly on the track so close to the car that the motorman cannot stop in time to prevent running over it, he is not guilty of negligence. Evidence considered and held sufficient to warrant a finding that the motorman was guilty of negligence.

APPEAL by defendant from judgment for plaintiff. Decided February 4, 1904.
Reported 139 Ala. 442, 36 So. 39.

Lapsley, Arnold & Martin, for appellant.

Ross Blackmon, for appellee.

Opinion by HARALSON, J.

The law is well settled that railroad companies that knowingly run their trains under conditions rendering it impracticable for those in charge to prevent injuring stock straying on their tracks, are accountable for the loss when injury results. *B. M. R. Co. v. Harris*, 98 Ala. 326, 13 So. 377; *L. & N. R. Co. v. Davis*,

(Mich.) 96 N. W. 437. See also *Nellis Street Railroad Accident Law*, p. 316, § 25.

The rule applicable to a steam railroad company negligently injuring cattle upon its track is applied in the above case to a company operating an electric railway. A railroad company is required to use reasonable care to avoid injury to animals upon its track. The mere killing of the animal itself does not render the company liable; the company must be shown to be guilty of negligence. *Great Western Ry. Co. v. Morthland*, 30 Ill. 451; *Turner v. St. Louis & S. F. Ry. Co.*, 76 Mo. 261. It is liable for a failure to use ordinary care and diligence to avoid a collision. *Rockford, R. I. & St. L. R. Co. v. Rafferty*, 73 Ill. 58; *Williams v. Michigan Cent. R. Co.*, 2 Mich. 259, 55 Am. Dec. 59; *Witherell v. Milwaukee & St. Paul Ry. Co.*, 24 Minn. 410. Reasonable care to prevent an injury to cattle upon track is such care as a prudent man in control of an engine would use to prevent the injury. *Mississippi Cent. R. Co. v. Miller*, 40 Miss. 45; *New Orleans, J. & G. N. R. Co. v. Feld*, 46 Miss. 573. A railroad company is only held to ordinary care in avoiding the injury. *Molair v. Port Royal & A. Ry. Co.*, 29 S. C. 152, 7 S. E. 60.

Duty to keep lookout for animals on track.—The failure of an engineer of a railway train to keep a diligent lookout for animals upon the track is negligence for which the company is liable.

Alabama.—*Louisville & Nashville R. Co. v. Rice*, 101 Ala. 676, 14 So. 639; *Louisville & Nashville R. Co. v. Posey*, 96 Ala. 262, 11 So. 423; *Mobile & B. Ry. Co. v. Kimbrough*, 96 Ala. 127, 11 So. 307; *East Tennessee, V. & G. R. Co. v. Watson*, 90 Ala. 41, 7 So. 813; *Alabama G. S. R. Co. v. Powers*, 73 Ala. 244.

103 Ala. 661, 16 So. 10; *L. & N. R. Co. v. Cochran*, 105 Ala. 354, 16 So. 797, *L. & N. R. Co. v. Kelton*, 112 Ala. 533, 21 So. 819; *C. of G. R. Co. v. Stark*, 126 Ala. 367, 28 So. 411.

This principle applies, when needful for the protection of life and property, to a railroad on which electricity is used as the moving power, as well as to one operated by steam. *L. & N. R. Co. v. Anchors*, 114 Ala. 493, 22 So. 279, 62 Am. St. Rep. 116.

The law enjoined on the motorman operating defendant's car, the duty to keep a lookout for live stock, and not to run his car at such a rate of speed that he could not stop it within the distance he could see the plaintiff's cow. The only qualification of this rule is, that where — such duties being observed by the engineer or motorman — the animal comes suddenly upon the track, so close to the engine that the engineer cannot stop in time to prevent running over it, in which case its destruction cannot be ascribed to defendant's negligence. *L. & N. R. Co. v. Brinkerhoff*,

Colorado.— *Colorado Cent. R. Co. v. Caldwell*, 11 Colo. 545, 19 Pac. 542.

Illinois.— *Chicago & A. R. Co. v. Legg*, 32 Ill. App. 218 (holding that an instruction requiring that the engineer and fireman shall have used ordinary care in looking ahead for the purpose of detecting anything on the track, the degree of care to be considered with reference to all other duties, is proper).

Indiana.— *Chicago, St. Louis & P. R. Co. v. Nash*, 24 N. E. 884.

Kansas.— *Missouri Pacific Ry. Co. v. Gedney*, 24 Pac. 464, 21 Am. St. Rep. 286.

Missouri.— *Buster v. Hannibal & St. J. Ry. Co.*, 18 Mo. App. 578.

Nebraska.— *Omaha & R. V. Ry. Co. v. Wright*, 47 Nebr. 886, 66 N. W. 842 (holding that it is the duty of an engineer in charge of a train to exercise such a lookout as is consistent with his other duties to ascertain the presence of obstructions on the track, and if such a precaution would have revealed the presence of trespassing stock in time to have avoided their injury by the use of ordinary care, the railroad company is liable for injuries inflicted upon them, although they were not actually seen until too late to avoid striking them).

North Carolina.— *Carlton v. Wilmington & W. R. Co.*, 104 N. C. 365, 10 S. E. 516; *Wilson v. Norfolk & S. R. Co.*, 90 N. C. 69; *Pippen v. Wilmington, C. & A. R. Co.*, 75 N. C. 54.

West Virginia.— *Layne v. Ohio River R. Co.*, 35 W. Va. 438, 14 S. E. 123.

United States.— *Gulf, C. & S. F. R. Co. v. Johnson*, 54 Fed. 474, 4 C. C. A. 447, 10 U. S. App. 629.

119 Ala. 606, 24 So. 892; *C. of G. R. Co. v. Stark*, 126 Ala. 367, 28 So. 411.

In this case, the evidence showed without conflict, that by an ordinance of the city of Anniston, in the corporate limits of which city plaintiff's cow was killed, it was ordained, that "no person shall run, or cause to be run, any railroad train, car, or engine, within the corporate limits of Anniston, faster than at the rate of six miles an hour." The evidence satisfactorily showed that the car was running, at the time of the accident, over six miles an hour. The motorman testified, it was running about ten miles an hour. He also testified, that a car running at an ordinary rate of speed can be stopped within a distance of about thirty steps. Other evidence tended to show, that it can be stopped within a distance of twenty-five or thirty steps, and that it could not be stopped within fifteen or twenty steps. The motorman also testified that when he first saw the cow, she was running up a bank about twenty feet ahead of the car; that he put the brakes on immediately as tight as he could, and did all he could to stop the car; that he could not see over twenty feet in front of the car, and it was impossible to stop it within that distance. The killing occurred in the night-time, and the track was straight and free from objects calculated to obstruct the view of the motorman.

From this it appears, that the car was being run in the night-time, at a speed which was in violation of the city ordinance, and so rapidly, as that it could not be stopped within the distance the cow was seen when she came on the track — twenty steps ahead.

The court below, trying the case without a jury, found for the plaintiff, and rendered a verdict and judgment in his favor for \$30, the value of the cow as shown by the evidence. It has not been made to appear that this judgment was erroneous.

Affirmed.

Doolin v. Omnibus Cable Co.

(California — Supreme Court.)

1. **INJURY TO PASSENGER BY DERAILING OF HORSE CAR.**¹— Evidence as to negligence of the driver of horses on street car whereby the horses suddenly swerved to one side and hauled the car over an embankment considered, and deemed sufficient to justify a submission of the question of negligence to the jury.
2. **INSTRUCTION AS TO RIGHT OF WAY.**— An instruction to a jury by the court to the effect that if a private vehicle in traveling upon a public highway meets with a street car, and there is no special reason to the contrary, the private vehicle must yield the right of way to the street car is not erroneous.

APPEAL by defendant from judgment for plaintiffs. Decided September 28, 1903. Reported 140 Cal. 369, 73 Pac. 1060.

A. A. Moore and *W. H. L. Barnes*, for appellant.

Sullivan & Sullivan, for respondents.

Opinion by **HENSHAW, J.**

This action was to recover damages for the alleged negligent injury of the plaintiff Mary Jane Doolin. The verdict of the jury was for plaintiffs, and from the judgment which followed, and from the order denying defendant's motion for a new trial, this appeal is prosecuted.

The evidence is sufficient to support the verdict. The plaintiff Mary Doolin, upon November 17, 1891, was a passenger upon one of the horse cars of the defendant. The progress of the car was stopped by a heavily-loaded wagon which was upon the track, and going in a direction opposite to that of the car. Both the car and the wagon stopped. The wagon endeavored to turn off from the track, but such was the condition of the road at that place that it was not possible for it to do so. The driver of the car then tied his lines to the dashboard, and, with the assistance of a passenger, proceeded to back the car with the horses attached. Having done so, he returned to his car, and had just taken the lines into his hands, when his horses swerved suddenly and violently, wrenched the car about as though it were upon a turn-

1.*As to liability for injury to passenger caused by derailment of car, see note to *Smith v. Milwaukee Elec. Ry. & L. Co.*, *post*, p. 962.

table, and dragged it down a five-foot descent with a 50 per cent. grade, and on about forty or fifty feet farther, until its progress was arrested by the men who seized the car horses by their bridles. The car horses, to quote from appellant's brief, were "docile and ordinarily gentle, but had become frightened and nervous by reason of one of the horses on the spike team being driven against one of the car horses, and by the backing and hauling and pulling to which they had been subjected in backing the car." The driver, at the time he returned to his car and took the lines in his hand, either dropped one of them, or one was jerked from his grasp by the plunging horses. The lines were not buckled, and the loose line went over the dashboard onto the ground. The driver was thus helpless to control his team, and so it was that the horses succeeded in derailing the car.

Upon the question of the negligence of the company, it was debatable under the evidence, and, therefor, a matter for the jury to decide, whether the driver had negligently dropped a line, whether it was negligence that his lines were not buckled, whether he negligently permitted the line to be jerked from his hand, whether it was negligence to back the car as he admittedly did with the nervous and frightened horses attached to it and to force them to back, and whether, in the exercise of proper care, he should not have detached his horses, attached them to the rear end of the car, and so have dragged it back. The fact of the accident and the fact of the negligence of the driver were thus established to the satisfaction of the jury. There is no doubt but that plaintiff Mary Doolin was a passenger upon the car at the time of the accident, and went with the car over the embankment. She had her baby in her arms. Her testimony and the supporting testimony is that she was hurled against the side or seats of the car and sustained brain and spinal injuries of grave consequence. Against this there is evidence that she stated immediately after the accident to other passengers upon the car that she was not hurt a bit, and laughed over the experience through which she had passed. From the testimony it is sufficiently established that she was injured, and severely injured judging by her condition before and at the time of this accident and her proved condition thereafter. It was for the jury to say whether or not her in-

juries were the result of this accident, and by their verdict they declared that they were.

Error is predicated upon the refusal of the court to give an instruction to the effect that, after the plaintiffs had proved to the jury's satisfaction that there was an accident to the car upon which Mrs. Doolin was a passenger, "the plaintiffs are then bound to prove by a preponderance of evidence that Mrs. Doolin was injured in that accident, and, failing in this, there can be no recovery by plaintiffs." This proposed instruction is, of course, unimpeachable in point of law; but over and over again the court instructed the jury that the plaintiffs could recover only for such injuries as Mrs. Doolin received in that accident, nor was the case tried and submitted to the jury upon any other theory than that the plaintiffs must prove that Mary Doolin was injured in the accident charged upon.

Complaint is further made of the instruction given by the court to this effect: "In arriving at a verdict in this case, if you find that the plaintiff Mary Jane Doolin sustained any injuries whatever through any negligence of the defendant or its employee, you must take into consideration the physical and mental condition of Mrs. Doolin before the occurrence of the accident, her accomplishments, if any, her ability to play musical instruments and sing." And further, in the same connection, the jury was charged to take into consideration "the effect, if any, upon her ability to play upon musical instruments and sing, of the accident to her." It is said that this was equivalent to importing an element of special damage not pleaded in the cause, to wit, the financial loss occasioned by the impairment or destruction of her musical abilities. Evidence of these abilities and of their impairment and destruction was admitted in the case without objection. The complaint charged that by reason of her injuries "she became sick, sore, lame, and disordered, her spine, brain, and nervous system were seriously injured." We think the attack made upon the instruction given is not tenable. It did not direct the jury's attention to her impaired or destroyed musical abilities to the end that they might fix a monetary value upon their impairment or loss, but they were directed to consider the evidence upon this point in determining, within the language of the allegation in the complaint, whether or not she had been injured as to

her spine, brain, and nervous system, and to what extent. The case, in principle, is identical with that of *Cons. Kansas City Co. v. Tinchert*, 2 Am. Neg. Rep. 534, where it is said: "For the purpose of showing the extent and character of an injury, it was competent for the plaintiff to show that he was a musician prior to the accident, and that by reason of the injuries inflicted upon him he was afterward unable to blow the wind instrument he had been in the habit theretofore of using, notwithstanding there was no allegation in the petition respecting the fact that he was a musician, and that his injuries had deprived him of the power of pursuing that occupation."

Defendant proposed the following instruction: "A street car has the right of way upon that portion of the street upon which it alone can travel. If, therefor, a private vehicle, in traveling upon the public highway, meets with a street car, the private vehicle must yield the right of way to the street car." The court gave the instruction, modified so as to read: "If, therefore, a private vehicle, in traveling upon the public highway, meets with a street car, and there is no special reason to the contrary, the private vehicle must yield the right of way to the street car." The proposed instruction, of course, accurately states the law. The modification, as given by the court, does not clarify it any, but at the same time it cannot be said that the modification imported into it any prejudicial error.

Complaint is made of the conduct of one of the jurors, Mohrig by name, who, it is asserted, by the frequent questions which he propounded to witnesses, displayed himself, not as a juror, but as an advocate of the plaintiffs, and prejudged defendant's case. Whatever merit there may be in this contention, no objection nor exception to the conduct of the juror was taken on the trial, and it is not permissible here to raise the point for the first time. *Monaghan v. Rolling Mill Co.*, 81 Cal. 194, 22 Pac. 590; *Cons. Ice Machine Co. v. Trenton Ice Co.* (C. C.), 57 Fed. 898; *Atl., etc., Co. v. Peake*, 87 Va. 130, 12 S. E. 348; *Rowe v. Canney* (Mass.), 29 N. E. 219; *Bruswitz v. Netherland Co.*, 64 Hun, 263, 19 N. Y. Supp. 75.

For the foregoing reasons, the judgment and order appealed from are affirmed.

McFARLAND and LORIGAN, JJ., concur.

Harrington v. Los Angeles Railway Co.

(California — Supreme Court.)

1. **COLLISION WITH BICYCLIST RACING IN CITY STREET; CONTRIBUTORY NEGLIGENCE.**—The plaintiff's intestate was one of a number of bicyclists competing in a race for a prize, over the streets of a city. While going at a high rate of speed, in attempting to avoid collision with one of the defendant's street cars, he was struck by the car, thrown from his bicycle and killed. There was an ordinance of the city prohibiting the riding of bicycles at an excessive rate of speed, which was being violated at the time by the deceased. It was held that the deceased was guilty of contributory negligence.
2. **RULE AS TO OPPORTUNITY OF AVOIDING ACCIDENT.**—The rule was applied to the effect that he who last has a clear opportunity of avoiding an accident by the exercise of proper care to avoid injuring others must do so, and that, notwithstanding the decedent's contributory negligence, the jury was justified under the evidence in finding that the negligence of the defendant's motorman in failing to exercise reasonable care to avoid the collision was the proximate cause of the injury. The reasonableness of the decedent's efforts to escape injury after a discovery of his danger was a question for the jury.
3. **KNOWLEDGE OF MOTORMAN AS TO DANGER.**—It appeared that the decedent by reason of his own negligence was placed in a position of peril with relation to the defendant's car. The defendant's motorman knew of the danger to the decedent, and knew that by simply stopping the car the source of danger would be removed and injury avoided. The failure to stop the car was negligence, under the rule that one having knowledge of the dangerous situation of another, and having a clear opportunity by the exercise of proper care to avoid injuring him, must do so, notwithstanding the latter placed himself in such situation of danger by his own negligence.

Collision with bicyclist.—Other cases reported in this series as to injuries caused by collisions with bicyclists are: *Balwin v. Heraty*, 2 St. Ry. Rep. 503, (Mich.) 98 N. W. 739; *Walters v. Syracuse R. T. Ry. Co.*, 2 St. Ry. Rep. 758, 178 N. Y. 50, 70 N. E. 98; *Schroder v. Metropolitan St. Ry. Co.*, 2 St. Ry. Rep. 785, 87 App. Div. (N. Y.) 624, 84 N. Y. Supp. 371; *North Chicago St. Ry. Co. v. Irwin*, 1 St. Ry. Rep. 71, 202 Ill. 345, 66 N. E. 1077 (to which case is appended a note pertaining to the contributory negligence of a bicyclist riding upon tracks, and the duty of a motorman to avoid collision); *North Chicago St. R. Co. v. Cossar*, 1 St. Ry. Rep. 106, 203 Ill. 608, 68 N. E. 88; *Robards v. Indianapolis St. Ry. Co.*, 1 St. Ry. Rep. 133, (Ind. App.) 67 N. E. 953; *Zolpher v. Camden & Sub. Ry. Co.*, 1 St. Ry. Rep. 549, (N. J. L.) 55 Atl. 249. See also *Nellis Street Railroad Accident Law*, p. 290, § 21.

INSTRUCTION AS TO NEGLIGENCE.—It is not error to charge under the circumstances of the case that, although one might not have the actual intent to injure, still if there is on his part a reckless indifference or disregard of the probable consequences of an act, and he does the act, conscious from his knowledge of existing circumstances and conditions, that his conduct will probably result in injury, he is guilty of wanton negligence. Other instructions relative to the negligence of the defendant and the contributory negligence of the decedent were considered.

APPEAL by defendant from judgment for plaintiffs. Decided October 8, 1903.
Reported 140 Cal. 514, 74 Pac. 15.

Bicknell, Gibson & Trask, for appellant.

Hunsaker & Britt, for respondents.

Opinion by ANGELLOTTI, J.

This action was instituted by the plaintiffs, the widow and minor children of Arthur E. Harrington, deceased, for damages alleged to have been sustained by them by reason of the death of

Liability for failure of motorman to exercise proper care in avoiding collision.—In a large proportion of the cases involving the liability of a street railroad company for injuries occasioned by its cars colliding with pedestrians and vehicles, where the plaintiff's contributory negligence is either conceded or established the question arises as to whether the company was liable notwithstanding such contributory negligence because of its failure to exercise due care to prevent the injury. The determination of this question depends upon the negligence of the motorman in charge of the car in failing to make reasonable effort to avoid running down a person or vehicle whom he sees in a position of peril upon the tracks in front of his car. If such negligence is established it relieves the person injured from the effect of his own contributory negligence. But in every case where contributory negligence is thus shown the negligence of the motorman in failing to avoid the injury must have been the direct and proximate cause of the injury. If the negligence of the person injured and that of the motorman were concurrent, that is, if they occurred so close to each other in point of time that one cannot be separated from the other, the contributory negligence of the person injured precludes his recovery. See *Ries v. St. Louis Transit Co.*, 2 St. Ry. Rep. 504, (Mo. Sup.) 77 S. W. 734; *Richmond Passenger & Power Co. v. Gordon*, 2 St. Ry. Rep. 936, (Va.) 46 S. E. 772.

It is a well-established rule of quite general application that a plaintiff who, by his own negligence, has placed himself in a dangerous position where an injury was likely to result, may still recover for such injury, if the defendant with knowledge, or such notice as is equivalent to knowledge, of plaintiff's

deceased, which death was alleged to have been caused by the negligence of defendant. A verdict was rendered in plaintiffs' favor for \$10,000, and from the judgment entered thereon and an order denying its motion for a new trial defendant has appealed.

danger, failed to exercise reasonable care by which the injury might have been avoided, unless his negligence was such that but for it the misfortune could not have happened, or unless the injury was the result of the concurrent negligence of both parties. *Nellis Street Railroad Accident Law*, p. 473, citing *Owensboro City R. Co. v. Hill*, 21 Ky. Law Rep. 1638, 56 S. W. 21; *Baltimore Cons. R. Co. v. Rifcowitz*, 89 Md. 338, 43 Atl. 762; *North Baltimore P. Ry. Co. v. Arneich*, 78 Md. 589, 28 Atl. 809; *Ennis v. Union Depot R. Co.*, 155 Mo. 20, 55 S. W. 878; *Coney v. Southern Elec. Ry. Co.*, 80 Mo. App. 226; *Davis v. People's Ry. Co.*, 67 Mo. App. 598; *Warren v. Union Ry. Co.*, 46 App. Div. (N. Y.) 517, 61 N. Y. Supp. 1009; *Rooks v. Houston, etc., R. Co.*, 10 App. Div. (N. Y.) 98, 41 N. Y. Supp. 824; *Cincinnati St. Ry. Co. v. Whitcomb*, 66 Fed. 915, 4 Am. Electr. Cas. 602.

Other cases reported in this volume in which the question as to whether or not a motorman exercised due care to avoid a collision with persons or vehicles upon the defendant's tracks are:

Collision with children on tracks.—*North Chicago St. Ry. Co. v. Johnson*, 2 St. Ry. Rep. 82, (Ill.) 68 N. E. 463; *Meeker v. Metropolitan St. Ry. Co.*, 2 St. Ry. Rep. 536, (Mo. Sup.) 77 S. W. 58; *Kube v. St. Louis Transit Co.*, 2 St. Ry. Rep. 597, (Mo. App.) 78 S. W. 55; *Jett v. Central Elec. Ry. Co.*, 2 St. Ry. Rep. 513, (Mo. Sup.) 77 S. W. 738; *McDonald v. Metropolitan St. Ry. Co.*, 2 St. Ry. Rep. 788, 93 App. Div. (N. Y.) 238, 87 N. Y. Supp. 699; *Sciurba v. Metropolitan St. Ry. Co.*, 2 St. Ry. Rep. 789, 87 App. Div. (N. Y.) 614, 84 N. Y. Supp. 85; *Forrestal v. Milwaukee Elec. Ry. & L. Co.*, 2 St. Ry. Rep. 968, (Wis.) 97 N. W. 182.

Collision with pedestrians.—*Eichorn v. New Orleans & C. R. L. & P. Co.*, 2 St. Ry. Rep. 351, 111 La. 67, 36 So. 335; *McLelland v. St. Louis Transit Co.*, 2 St. Ry. Rep. 621, (Mo. App.) 80 S. W. 30; *Lynch v. Third Ave. R. Co.*, 2 St. Ry. Rep. 785, 88 App. Div. (N. Y.) 604, 85 N. Y. Supp. 180; *Galveston City Ry. Co. v. Hanna*, 2 St. Ry. Rep. 910, (Tex. Civ. App.) 79 S. W. 639; *Richmond Traction Co. v. Martin's Adm'x*, 2 St. Ry. Rep. 921, (Va.) 45 S. E. 886.

Collision with vehicles driven along or across tracks.—*Chicago Union Traction Co. v. Browdy*, 2 St. Ry. Rep. 138, (Ill. Sup.) 69 N. E. 570; *Moritz v. St. Louis Transit Co.*, 2 St. Ry. Rep. 619, (Mo. App.) 77 S. W. 477; *Holden v. Missouri Ry. Co.*, 2 St. Ry. Rep. 573, (Mo. Sup.) 76 S. W. 973; *Barrie v. St. Louis Transit Co.*, 2 St. Ry. Rep. 617, (Mo. App.) 76 S. W. 706; *Searles v. Elizabeth, P. & C. J. R. Co.*, 2 St. Ry. Rep. 706, (N. J. L.) 57 Atl. 134; *Wilson v. Chippewa Valley Elec. Ry. Co.*, 2 St. Ry. Rep. 979, (Wis.) 98 N. W. 536.

It is earnestly contended that the evidence was insufficient to sustain the verdict. The claim in this regard is that, assuming that the defendant was negligent, still the evidence shows that the deceased was guilty of such contributory negligence as will preclude a recovery on the part of plaintiffs.

The deceased was at the time of the accident, July 4, 1900, participating in a long-distance handicap bicycle race from Los Angeles to San Pedro or Santa Monica, a distance of about twenty miles. This race was described as "the usual Fourth of July race." The start was from the corner of Sixth and San Pedro streets, in the city of Los Angeles, and the course was southerly from Sixth street along San Pedro street, between the double tracks of defendant's street railway on said street as far as Washington street. On Ninth street, which intersects San Pedro street between Sixth and Washington streets, was a single-track railway of the defendant, crossing said double tracks on San Pedro street nearly at right angles. The participants in the race were numerous, probably more than 100, and they were started in groups, every fifteen seconds, or less in some cases, for about twelve minutes. Several groups of riders had preceded the group of which deceased was a member, and which consisted of nine men. While the last four of these riders were approaching the Ninth street track, the other five having already crossed the same, one of defendant's Ninth street electric cars proceeding westerly along said street crossed San Pedro street in front of them. The riders were going at a high rate of speed, probably twenty miles an hour, although some of the witnesses put it a little lower and some higher. The car was proceeding two and one-half to four miles an hour. The deceased, having discovered the approach of the car, left the group with which he was riding, and attempted either to pass in front of the car on the westerly side of San Pedro street, or to turn up Ninth street, and in so doing collided with the right-hand front corner of the car and was killed. The other three riders attempted to pass by the rear of the car. One of them testified that when about fifteen or twenty feet from the car he threw himself sideways from his wheel to avoid striking the car, which he would otherwise have done, and, striking the ground, rolled clear to the car, against its side, and

the other two riders fell over him. The railway tracks on San Pedro street were lined with people witnessing the race, such lines extending across Ninth street and the railway tracks of defendant thereon.

At the time of the accident there was an ordinance of the city of Los Angeles which prohibited any person from riding or propelling any bicycle within the corporate limits of the city at a rate of speed greater than eight miles per hour. The deceased was violating this ordinance, and was consequently guilty of negligence, without which, undoubtedly, the accident would not have occurred. If there had been no ordinance regulating the speed of bicyclists, it might well be contended that the evidence would have sustained a finding of the jury, that the deceased had not been guilty of contributory negligence — a finding that, under all the circumstances shown, the deceased was justified in assuming that the course between the railway tracks along San Pedro street would be kept sufficiently clear of obstructions to allow him to go at as high a rate of speed as he could; that he used all such precautions as a reasonable man under the same circumstances would use; that he discovered defendant's car as promptly as a reasonable man using such precautions would discover it; and that when he discovered the car he used reasonable care in attempting to avoid a collision therewith. But he was guilty of negligence in his violation of the provisions of the ordinance, and if it had not been for this negligence on his part the accident would not have occurred.

The complaint alleges that the defendant did, by its motorman having charge of the operation of the car, "negligently, wantonly, and with wanton and reckless indifference to the safety of said Arthur E. Harrington, drive and propel said car against him, * * * who was then and there in full sight and view of said motorman," in consequence of all which said Harrington died. The claim of the plaintiffs in this connection is that, notwithstanding the negligence of the deceased, the motorman was aware of the perilous position in which the deceased had placed himself, and could, by the exercise of ordinary care, have avoided the accident, but failed to exercise such care to do so, and recklessly drove his car forward in the path of the racers, and that this negligence

on his part was the proximate cause of the death of the deceased. It will thus be seen that plaintiffs invoked the rule enunciated in several opinions of this court to the effect that he who last has a clear opportunity of avoiding an accident by the exercise of proper care to avoid injuring others must do so.

There was ample evidence to justify the jury in finding that defendant's motorman discovered the perilous position in which the deceased and his companions were placed at such a time and under such circumstances that he could, by the exercise of ordinary care, have avoided injuring them, and that he did not exercise such care. It needs no argument to demonstrate that bicycle racers traveling at the rate of twenty miles an hour or more along a narrow path, lined with spectators on both sides, and only eighty-five feet away (as the testimony of one disinterested witness indicated) from a place, on that path, toward which they were going, over which an electric car was about to cross, were already in a position of great peril, by reason of the approach of said car. Such circumstances would naturally convey to the mind of any reasonable man, having knowledge thereof, the question as to whether the riders, even though they immediately discovered the approach of the car, which was doubtful, would be able to get out of the way, and whether they must not inevitably cross the track along which the car was about to go, however much they might endeavor to avoid so doing, after discovering the car, in order to escape collision. There is no parallel between a case presenting such circumstances and the ordinary case where a person is discovered walking or riding toward a railroad track. Ordinarily, the person operating the car has the right to assume that the one so approaching is able to and will care for himself, by taking all necessary precautions to observe the approach of the car, and that he will not place himself on the track at such a time as to be injured thereby. But no such assumption could be held to be justified under the peculiar circumstances already stated.

There was evidence warranting the jury in finding that the motorman, who confessedly knew that the bicycle race was then in progress on San Pedro street, was warned by some of the numerous bystanders before he had reached the easterly line of San Pedro street that the racers were coming, some calling upon him

to stop the car, and others exclaiming that the racers were coming; that some stood on the track in front of the car, endeavoring to stop the car by calling upon the motorman; he nevertheless proceeded, traveling at from two and one-half to four miles per hour, forcing the people in front to retire from the track; that he himself, after hearing the various warnings, saw the racers approaching under the circumstances already detailed, when he was still at least twenty or twenty-five feet east of the easterly line of the path along which they were proceeding; that after such discovery he could easily have stopped his car before it reached the path along which the bicyclists were proceeding, and thus have insured absolute safety to the riders, but that, on the contrary, he pushed his car forward, in reckless disregard of the dangerous position of deceased and his companions, knowing or having reasonable cause to believe that they must cross the track over which he was about to go. It is true that the evidence is conflicting on some material points, and that the motorman testified that he did not discover the approach of the riders until it was too late to stop, and that he then used all reasonable care to avoid injuring them. But the jury evidently did not believe this evidence to be true, and it was for them to determine the facts. There was also ample evidence to justify the jury in finding that immediately upon discovering his dangerous position the deceased exercised reasonable care in endeavoring to avoid injury. One of his fellow riders testified that the deceased exclaimed, "My God, look at that car!" And immediately switched off and tried, as he supposed, to go around the front end of the car. The fatal result, and the escape from serious injury of the others, is in no way determinative of the question as to whether he used such reasonable care, for, as has been well said, "It is always easy after an accident to see how it could have been avoided, but a man's duty before the calamity is not measured by such *ex post facto* information." *Liverpool, etc., Ins. Co. v. S. P. Co.*, 125 Cal. 434, 439, 58 Pac. 55, 57. It must be remembered that a person in great peril, where immediate action is necessary to avoid it, is not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances. The reasonableness of his effort to escape injury, after discovery of

the danger, was a question for the jury, to be determined by them in view of all the circumstances shown by the evidence. We, therefore, have a case where the jury were warranted in finding the facts to be as follows, viz.: Deceased, by reason of his own negligence, was placed in a position of peril with relation to defendant's car. The defendant knew that the deceased was so placed, knew that it was at least doubtful whether the deceased could, by any act of his, remove himself from such peril, and knew that it could by the exercise of ordinary care, by simply stopping its car, absolutely remove the source of danger and avoid the injury. It failed to exercise such care, and recklessly pushed its car forward into the path over which the deceased was approaching, its motorman preferring to take the chance of getting over before deceased arrived at the crossing. The deceased, immediately upon discovering his dangerous position, used all reasonable care and made all practical effort to avoid the accident.

Upon this state of facts, established as the facts of this case by the verdict of the jury, the liability of the defendant follows as a matter of law, and the verdict is fully sustained by the evidence.

It would be difficult to find a case more clearly justifying the application of the rule so often approved by this court, to the effect that one having knowledge of the dangerous situation of another, and having a clear opportunity by the exercise of proper care to avoid injuring him, must do so, notwithstanding the latter placed himself in such situation of danger by his own negligence. *Lee v. Market Street Ry. Co.*, 135 Cal. 293, 67 Pac. 765; *Fox v. Oakland Con. St. Ry. Co.*, 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; *Esrey v. S. P. R. Co.*, 103 Cal. 541, 37 Pac. 500; *Cunningham v. L. A. Ry. Co.*, 115 Cal. 561, 47 Pac. 452; *Abrahams v. L. A. Traction Co.*, 124 Cal. 411, 57 Pac. 216; *Crowley v. City R. Co.*, 60 Cal. 628; *Meeks v. S. P. R. Co.*, 56 Cal. 513, 38 Am. Rep. 67; *Needham v. S. F. & S. J. R. Co.*, 37 Cal. 409. It is immaterial whether the liability of the defendant in such a case be based upon the theory that the negligence of the defendant, being the later negligence, is the sole proximate cause of the injury, or upon the theory that defendant has been guilty of willful and wanton negligence. In either case the liability

would exist; for, where an act is done willfully and wantonly, contributory negligence upon the part of the injured person is no bar to a recovery. *Esrey v. S. P. R. Co.*, *supra*. As said by Mr. Beach in his work on Contributory Negligence:

"When one, after discovering that I have carelessly exposed myself to an injury, neglects to use ordinary care to avoid hurting me, and inflicts the injury upon me as a result of his negligence, there is very little room for a claim that such conduct on his part is not willful negligence."

It is, of course, true, as urged by defendant, that it is essential to such liability that the defendant did actually know of the danger, and that there is no such liability where he does not know of the peril of the injured party, but would have discovered the same but for remissness on his part. *Herbert v. S. P. R. Co.*, 121 Cal. 227, 53 Pac. 651. This, however, does not mean, as seems to be contended, that defendant must know that injury is inevitable if he fails to exercise care, and the decisions indicate no such requirement. It is enough that the circumstances of which the defendant has knowledge are such as to convey to the mind of a reasonable man a question as to whether the other party will be able to escape the threatened injury. One in such a situation is in a dangerous position. It was said in the prevailing opinion in *Everett v. L. A., etc., Ry. Co.*, 115 Cal. 105, 106, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350, distinguishing that case from those where the principle under discussion is applicable:

"The case is not like one where the injured party is discovered in time lying or standing upon a railroad track under such circumstances as to make it doubtful whether he can or will get out of the way; or where one is even attempting, either on or otherwise, to make a crossing, or passing along or on its track over a bridge or narrow causeway, or in a deep cut or tunnel, where to turn aside would be either dangerous or impossible. * * * Persons cannot be recklessly or wantonly run down on a railroad track, however negligent themselves, where the circumstances are such as to convey to the mind of a reasonable man a question as to whether they will be able to get out of the way."

See also *Meeks v. S. P. R. Co.*, 56 Cal. 513, 515, 38 Am. Rep. 67.

It cannot be held, in view of the evidence in the record and the finding of the jury, that the negligence of the deceased continued

to the moment of the accident, and that both parties were contemporaneously and actively in fault at the time thereof; and what is said in several cases as to the inability of the injured party to recover under such conditions (see *Holmes v. S. P. R. Co.*, 97 Cal. 161, 31 Pac. 834; *Sego v. S. P. R. Co.*, 137 Cal. 405, 70 Pac. 279; *Everett v. L. A. Con. Elec. Ry. Co.*, 115 Cal. 105, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350) is inapplicable here. The deceased did unquestionably discover his dangerous situation before the accident, and the verdict is a finding that he used all reasonable care and made all practicable effort to avoid the accident.

Defendant contends that there may have been a moment after the motorman discovered the approach of the racers during which deceased had failed to discover the approach of the car, and that during this moment deceased continued to proceed until it was too late to escape injury, and that he was thereby guilty of negligence precluding a recovery. It may be freely admitted that the deceased did not discover the approach of the car as early as the motorman discovered the approach of the deceased, but we are unable to see anything to the advantage of defendant's cause in such a condition of affairs. If the motorman discovered the deceased in a dangerous situation, and the jury have found that he did, it was his duty to use ordinary care to avoid injuring him, regardless of whether or not the deceased was aware of his approach, and the jury have found that he did not use such care.

That the evidence was sufficient to justify a conclusion that the motorman had the last clear opportunity to avoid the accident seems very clear. We shall have occasion to consider this contention of defendant again in discussing the instructions to the jury.

The motorman Myer, having been examined by defendant as to the circumstances of the accident, was asked: "Would you have moved that car in there if you had supposed thereby you were endangering the lives of those bicycle riders?" Plaintiffs' objection thereto was sustained. The witness then testified as follows: "I thought that it was best to move on at that juncture, because I thought I had plenty of time, and also that it was dangerous for me to stop the car at that time." It is unnecessary to discuss the question as to whether or not error was committed in sustaining

the objection, for the subsequent testimony of the witness was a complete statement as to his reason for moving the car forward. He said that he thought he had plenty of time to cross, and that it would be dangerous to stop. This excludes any supposition that he was endangering the lives of the riders by moving on. What he would have done as to moving on, if he had supposed otherwise than he did, is entirely immaterial.

Complaint is made as to various instructions given at the request of the plaintiffs. It is urged that the jury may have concluded from plaintiffs' fourth instruction that they were authorized in finding a verdict against the defendant, although they may have believed that the motorman neither expressly nor impliedly intended to injure deceased or any one else. No purpose or design on the part of the motorman to injure was essential to defendant's liability, and the plain object of the instruction was to so inform the jury. By it (the jury) were substantially told that, although one might not have the actual intent to injure, still if there is on his part a reckless indifference or disregard of the natural or probable consequences of doing or omitting to do an act, and he does or fails to do the act, conscious, from his knowledge of existing circumstances and conditions, that his conduct will likely or probably result in injury, he is guilty of wanton negligence. We see no prejudicial error in this statement. *Esrey v. S. P. R. Co.*, *supra*; *Everett v. L. A. Con. Elec. Ry. Co.*, 115 Cal. 127, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350; Beach Cont. Neg., §§ 55, 62.

Defendant's objection to plaintiff's instructions 5, 6, 7, and 9 is that they are predicated upon an alleged erroneous theory of the law, viz.: That where the injured party's own negligence brings him into danger, and defendant discovers the danger in time to avoid ensuing injury by the exercise of ordinary care, and fails to exercise such care, the defendant is liable notwithstanding such negligence of the injured party, if he, the injured party, after discovering his own danger, exercises ordinary care to escape the injury. This, it is urged, relieved the injured party entirely from the consequences of his negligent failure to discover his own danger resulting from his own negligence. We see no force in the contention that the theory upon which it is said these

instructions were predicated is erroneous. Such an instruction is applicable by its terms, only in the event that the defendant discovers the negligent injured party already in a dangerous position — discovers him under such circumstances as preclude him from indulging in any assumption that he, the injured party, can or will get out of the way. It is only because of such discovery that he is called upon to exercise ordinary care to avoid injuring him. Upon such discovery, it is his plain duty to use ordinary care to avoid injuring the negligent party, and if he has a clear opportunity to avoid such injury, *i. e.*, "Such an opportunity as would necessarily be clear and plain to a man of ordinary intelligence and prudence in a given emergency," and fails to take advantage thereof, he is liable for the injury, provided the other is not negligent after he discovers the danger. In such a case, he who knows of the danger, and recklessly proceeds regardless thereof, can find no refuge in the fact that the injured party who does not know of it would have known if he had used reasonable care to ascertain it. In such a case, he who knows of the danger and can avoid it, as against one who does not in fact know thereof, has the last clear opportunity to avoid the accident. If a motorman should discover a man asleep on the track in front, and knowing him to be asleep, should proceed regardless of his position and condition, and run over him with his car while still asleep, there would be very little question that the motorman had the last clear opportunity, and that his negligence was the proximate cause of the injury.

As said before, such a case has no feature in common with one where the circumstances are such that the defendant has the right to assume that the other party can and will protect himself, and consequently that he is not in a dangerous situation. There was no prejudicial error in the modification by the court of defendant's requested instruction 4. It was sought by this requested instruction to have the jury instructed that if the deceased was at the time of the race propelling his bicycle at a rate of speed in excess of eight miles per hour, and did not look for an approaching car until it was too late to bring his bicycle to a standstill so as to avoid a collision, and did not at any time attempt to reduce the speed of said bicycle before said collision occurred, he was guilty of "gross" negligence. The court modified this by adding, "Or

did not attempt to turn it out of the way of said car before said collision occurred," as one of the prerequisites of gross negligence on the part of the deceased.

The defendant was not entitled to have the instruction given as requested. It is true that if deceased was riding at a rate of speed in excess of eight miles per hour, he was guilty of negligence as a matter of law, because of the city ordinance prohibiting such speed. That, however, was a matter fully covered by other instructions. Under the peculiar facts of this case, it was for the jury to say, taking into consideration all of the circumstances, whether a failure on the part of deceased to look for an approaching car in time to prevent a collision, or a failure to attempt to reduce the speed of the bicycle, was negligence at all, much less "gross negligence," which term we suppose was used as an equivalent of "willful or wanton" negligence. While it is true that the modification, under the undisputed evidence, took away the whole effect of the requested instruction, it did not add anything prejudicial to defendant's case, and, as the defendant was not entitled to the instruction at all, it cannot complain of the modification.

Certain instructions of defendant, directing a verdict in its favor if certain facts were found, were modified by adding a proviso of this character, viz.: "Unless you shall also find that the motorman in charge of defendant's car, after perceiving the dangerous situation then and there existing, did recklessly or wantonly send his car forward. Whether or not such reckless or wanton conduct of the defendant did occur and cause the collision is a question of fact for you to determine from the evidence, the same as you must determine other facts submitted." It is urged that these instructions make "recklessness" the equivalent of "wantonness," and that the terms are not synonymous. If one does a thing recklessly, without regard to the rights of another, he comes within the terms of the very definition of "wanton" cited by learned counsel for defendant, and if one, perceiving the dangerous situation of another, proceeds recklessly without regard thereto, there is little room for the claim that he is not doing a thing "recklessly without regard to the rights of another." We can see no distinction between the terms as used in these instructions.

We find no prejudicial error in the modification of defendant's requested instructions 10, 12, 15, 18, and 27. By instructions given, the jury were instructed in as favorable terms as defendant could ask as to what constituted ordinary care, as to the obligation of the deceased to exercise such care for his own safety, and as to proximate cause, and further, in effect, that if they found that the collision was in any degree due to the want of proper care and caution on the part of deceased, and not to any intervening cause proceeding from the defendant, their verdict must be for defendant. The modification of the tenth requested instruction consisted entirely in the omission of matter which would have withdrawn from the jury all question as to the effect of the conduct of defendant after discovering the peril of deceased. The twelfth requested instruction was erroneous, in that it precluded a recovery by the plaintiffs if the jury found that if the deceased had exercised ordinary care to have discovered the danger he would have discovered it in time to have avoided a collision, thus again withdrawing from the jury all consideration of the conduct of defendant, after discovering the peril of deceased. The omission by the court of the words, "and your verdict should be for defendant," which was the only modification made, was, therefore, not erroneous.

The portion of the fifteenth requested instruction that was omitted by the court was substantially covered by other instructions given.

The eighteenth requested instruction was erroneous, for the same reason as the tenth and twelfth, already noted. The requested instruction was to the effect that if the deceased, by looking or listening, with ordinary care, might have discovered the car approaching, and did not exercise such care, he was guilty of such negligence as would prevent a recovery by plaintiffs, and the modification by the court consisted in the addition of the words, "as against any ordinary negligence of the defendant." This could not be understood, under the circumstances of this case and the other instructions, as importing any part of the doctrine of comparative negligence into the case. The words "ordinary negligence," as there used, plainly meant such negligence as might have existed on the part of defendant, in the

absence of actual knowledge on its part of the perilous situation of the deceased, and a clear opportunity to avoid injuring him.

The twenty-seventh requested instruction was erroneous for the same reason as the tenth, twelfth, and eighteenth, and the modification thereof was proper.

Finally, it is claimed that the verdict is against law, in that it is contrary to an instruction wherein the jury were told that if they believed from the evidence that deceased approached the crossing where the accident occurred at a reckless rate of speed, without exercising any care or caution to ascertain whether any person was on or approaching the same, and that in consequence thereof the collision occurred, he was guilty of willful and wanton negligence, and their verdict must be for the defendant, notwithstanding any failure on the part of the motorman to exercise ordinary care.

In reply to this contention it is sufficient to say that, in our judgment, the evidence was not such that the jury was bound to find that deceased approached said crossing without exercising any care or caution to ascertain whether any person was on or approaching the same, or that in consequence of such approach the collision occurred.

The judgment and order are affirmed.

SHAW and VAN DYKE, JJ., concur.

San Francisco & San Mateo Electric Railway Co. v. Scott.

(California — Supreme Court.)

TAXATION OF STREET RAILWAYS;¹ PROVISIONS OF CONSTITUTION CONSTRUED.—

The constitutional provision (Cal. Const., art. 13, § 10), to the effect that the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county shall be assessed by the State

1. Other cases pertaining to the taxation reported in this series are as follows: *Detroit United Ry. v. Tax Com'rs*, 2 St. Ry. Rep. 495, (Mich.) 98 N. W. 997 (taxation of machinery used in operation of electric railway); *City of Philadelphia v. Electric Traction Co.*, 2 St. Ry. Rep. 862, (Pa. St.) 57 Atl. 354 (exemption of power-house for manufacture of electricity under general statute relating to taxation of railroad property for municipal

board of equalization at their actual value, and the same shall be apportioned to the municipal subdivisions in which such railroads are located in proportion to the number of miles of railway laid therein, has no application to an electric street railway whose lines extend into two or more counties. The distinction between an ordinary railroad and a street railway under such provision is based upon the fact that street railway franchises are granted by the municipalities in which the railway is constructed, and the value of such franchises varies according to the local conditions under which they are exercised.

APPEAL by plaintiff from judgment in favor of defendant. Decided on a rehearing February 15, 1904. Reported 142 Cal. 222, 75 Pac. 575.

Morrison & Cope, for appellant.

Franklin K. Lane, for respondent.

Opinion by SHAW, J.

This is an appeal by the plaintiff from the judgment of the court below in favor of the defendant. This appeal is on the judgment-roll alone. The plaintiff is the owner of a street railroad running from the intersection of Market street and Stewart street, in the city and county of San Francisco, to the town of Baden, in San Mateo county, with a branch at the intersection of Eighteenth and Guerrero streets to Golden Gate park, a total distance of twenty-three miles, of which eighteen and four-tenths is situated in San Francisco and the remainder in the county of San Mateo. During the times here involved the plaintiff was operating the road in more than one county; that is to say, it was operated as a continu-

purposes); *Knoxville Traction Co. v. McMillan*, 2 St. Ry. Rep. 879, (Tenn.) 77 S. W. 665 (privilege tax on business of advertising in street cars); *Mersick v. Hartford & W. H. H. R. Co.*, 1 St. Ry. Rep. 37, 55 Atl. 664 (claim of persons paying tax upon railroad, without authority of mortgagees); *City Council of Marion v. Cedar Rapids, etc., Ry. Co.*, 1 St. Ry. Rep. 192, (Iowa) 94 N. W. 501 (manner of assessing street railway property located in public street); *People ex rel. Brooklyn Rapid Trans. Co. v. Miller*, 1 St. Ry. Rep. 565, 85 App. Div. (N. Y.) 178, 83 N. Y. Supp. 96 (corporate franchise tax on street surface railroad company); *City of Philadelphia v. Philadelphia Traction Co.*, 1 St. Ry. Rep. 717, (Pa. St.) 55 Atl. 762 (constitutionality of act relating to taxation of railroad property); *Merrill Ry., etc., Co. v. City of Merrill*, 1 St. Ry. Rep. 844, (Wis.) 96 N. W. 686 (exemption of street railroad company upon payment of license fee).

ous line running from the terminus in San Francisco to Baden in San Mateo county. The assessor of San Francisco for the year 1899 made an assessment of the property of the plaintiff, including its franchise, roadway, roadbed, rails, and rolling stock situated in the county of San Francisco. In the same year the State board of equalization made a valuation of the entire line of the plaintiff's road, and apportioned the same between the county of San Mateo and the city and county of San Francisco, according to the mileage of the road situated in each county, respectively. The question which of these two assessments is the one sanctioned by law is the sole question in the case. It is conceded that if the word "railroads," as used in section 10, article 13, of the Constitution, is to be construed to include street railroads, the assessment of the State board of equalization must prevail, and the judgment must be reversed. The entire section in question is as follows: "All property except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township or district in which it is situated, in the manner prescribed by law. The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State board of equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which said railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships and districts."

At the time of the adoption of the Constitution there was not within the State a street railway operated in more than one county; nor was there any apparent probability that there ever would be such a street railroad. The Civil Code at that time classified street railroads and ordinary commercial railroads separately, designating one by the term "railroad" and the other by the term "street railroad." The constitutional convention was composed largely of lawyers, who must be presumed to have been familiar with the nomenclature used in the Civil Code. The street railroads then in operation were confined entirely to the limits of cities and towns. The debates in the convention show that there was there no suggestion that the provision in question was in-

tended to refer to street railroads, nor any reference other than to ordinary commercial railroads. In view of these facts, it cannot be said that either the convention or the people, in adopting this section of the Constitution, were looking forward to a possible condition, and adopting a regulation for the assessment of a possible street railroad which might at some future time be operated in more than one county. There was, therefore, clearly an absence of actual intention in using the word "railroads" to make a provision which also should apply to street railroads, if, peradventure, in the future one should come within the description. If the word is to be extended so as to include street railroads, it is not because of the actual intention of those who framed and adopted the Constitution to give the word that meaning, but because of the rule of law that where a provision is made by law for a certain class of subjects, and thereafter a new but similar subject is created, coming within the general description, and within the particular purpose and object of the law, it is to be considered as having been intended to be included in the original description. Thus, for illustration, a statute which imposes a penalty for "furiously driving any sort of carriage" was held to include and apply to bicycles, although at the time the statute was adopted bicycles had not yet come into existence. *Taylor v. Goodwin*, L. R., 4 Q. B. Div. 228.

A good deal is said in the briefs with respect to the rule of construction to be applied to such cases, but there is no better statement of the rule to be found than that given by this court in *Railroad Comrs. v. Market St. R. Co.*, 132 Cal. 678, 64 Pac. 1065, in these words: "In order to correctly determine this question we must look to the words used, the context, the object in view, and the evils that were intended to be remedied." The rule is stated in this language in *Massachusetts, etc. v. Hamilton*, 88 Fed. 588, 32 C. C. A. 46: "The meaning of the word must always depend upon the context and the legislative intent of the statute in which it is used, and must be ascertained from the occasion and necessity of the law, from the mischief felt, and the object and remedy in view."

As to the word used, it is manifest from an examination of the numerous cases cited on each side of the question that the

word "railroad" may or may not include street railroads, according to the circumstances, and that, in order to determine whether it does or not, we cannot consider the word itself as of any consequence, but must in every case look to the "context, the object in view, and the evils intended to be remedied." The context of the Constitution, as a whole, apart from this particular section, affords us little aid. It nowhere refers to street railroads in express terms. It was held in *Railroad Comrs. v. Market St. R. Co.*, *supra*, that the word, as used in sections 22 and 23 of article 12, providing for the supervision of railroads and railroad corporations by a board of commissioners, did not include street railroads. Yet it is not unlikely, notwithstanding what is said in the opinion in that case, that the same word, as used in some of the other sections in the same article, would be properly construed to include street railroads. We must, therefore, look to the immediate context of the article and section in question, and to the "object in view and the evils to be remedied."

The general subject of article 13, in which the section involved occurs, is the taxation and assessment of property and persons. Section 1 declares the general policy of the law to be that all property is to be taxed in proportion to its value, and that the value is to be ascertained in the manner provided by law. The general rule with respect to the manner of ascertaining the value is declared in the section here involved to be that all property shall be assessed by the local authorities of the place where it is situated. This general rule would suffice to give a uniform and just assessment of all ordinary property, but in considering the subject of the property of railroads extending from one county into another, and operated as a whole, as was the case with the greater number of the railroads, other than street railroads, then in operation in the State, it is manifest from the debates that the convention perceived that this method would cause much inequality in the valuation of the same kind of property, having substantially the same value, in the different counties, and would produce conflicts between the authorities of different counties concerning the exact location of the movable property, described as rolling stock, on the day its liability to assessment accrued, and probably some double assessments of such property in the respective counties. These

were the evils which the convention sought to remedy by the provision under consideration. The density of population and the value of lands at any point along the line of an ordinary railroad does not materially enhance the value of the roadway of that part of the line above its value in other places. Although it may cost more in one place than in another, its value for railroad purposes is substantially the same. The same is true of the roadbed and rails. Although absolute perfection may not have been attained, a substantially just and uniform assessment in the respective counties is thereby secured, and the result of the working of the method adopted has, on the whole, been reasonably satisfactory to the people in its application to this class of property of the ordinary railroads of the State.

Since the adoption of the Constitution, the growth of the State in population and wealth, and the ingenuity of man in making applications of the power of electricity, have made feasible and profitable the operation of ordinary street railroads in more than one county. The railroad in question is strictly a street railroad. It is expressly found by the court that it is a street railroad throughout its entire length, and if at any place it operates upon a roadway obtained from private individuals and not upon the public streets, or in any other manner than as a street railroad, that fact does not appear in the record. The question presented is whether or not such a road comes within the object and purpose of the constitutional provision. It is conceded, of course, that the mere matter of the motive power for the propulsion of the cars is entirely immaterial. There is nothing in the purpose of the provision, nor in the evils which it was designed to remedy, nor in its practical application, which gives to the means of moving the cars the least significance in the decision of the question before the court. So, also, we think it must be conceded that, with respect to the evils of double assessments, conflicting claims, and inequality in values between the different counties, there is no reason apparent why a street railroad should not be held to come within the scheme provided by the Constitution for the assessment of railroads operating in more than one county. It was chiefly upon these grounds that the decision was placed in the opinion first rendered in this case. If there were no greater distinctions between

the two classes of railroads than these, the conclusion that street railroads come within the object and purpose of the constitutional provision would be correct. Upon further consideration of the subject, however, we are of the opinion that other differences exist which were not considered in the former prevailing opinion, and which are sufficient to prevent the operation of the rule of construction contended for by the appellant. That rule cannot properly be applied where the new subject possesses characteristics so different from the old that to bring it within the scope of the pre-existing law would cause serious and substantial injustice. The different character of the franchise possessed by one class of roads from that possessed by the other, and the very serious interference with one of the fundamental principles upon which the power of taxation rests, which would arise from the operation of the constitutional plan, present sufficient reasons why a street railroad should be considered as not within the terms of this section of the Constitution. The franchise of an ordinary railroad is obtained upon terms and conditions equally applicable to all roads of its class by a compliance with the general law which empowers corporations to construct and operate a railroad between the designated termini, located, it may be, in counties widely separated. Civ. Code, § 291. At the time the Constitution was adopted the law provided that franchises for the construction and operation of street railroads along the streets and public highways could be obtained only from the governing body of the city or town in which it was situated. *Id.*, § 497. The law has been changed in some respects since that time, but the substantial provision still remains that the franchise can only be obtained through the action of the council or governing body of the municipality. Civ. Code, § 497; Stat. 1901, p. 265, chap. 103; Stat. 1903, p. 90, chap. 82. This franchise, of course, cannot extend beyond the city limits, and it is made subject to special conditions imposed by the local authorities — conditions which may be different in the case of each railroad of this character. It gives no authority whatever for the operation of a street railroad in more than one county. The only way by which a company can operate a street railroad in more than one county is by obtaining separate franchises from the local authorities of the respective counties, so located that the ends of the

two roads coincide at the county line, so that the two can be in fact operated as a continuous line running from one county into another. But the franchises must remain separate and distinct, and local in origin, situation, and character.

The incorporation of a street railroad company, of course, gives the corporation the power to do the business of operating street railroads, or some particular street railroad, as the case may be, as a natural person might do, and this power is doubtless a part of its general corporate franchise. But it is not to this that we now refer, but to the special permission to lay tracks in the streets, without which the power included in the grant of incorporation cannot be exercised. In the case of an ordinary railroad the right which it may acquire to operate its road along a public street is, strictly speaking, a mere right of way, similar to the right it may acquire from landowners along the route. It is a part of its roadway, and not a part of the franchise, within the meaning of the word in the phrase in question. It imposes no implied obligation upon the grantee or donee to facilitate the local public use of the street by carrying persons from place to place thereon. The right which a street railroad obtains from the city to lay its track and operate its road on a street, on the contrary, is the most valuable part of its franchise. It carries the obligation to serve the public in the use of the street, and is in furtherance of the original use. It does not receive this franchise by becoming incorporated, as an ordinary road receives its franchise to operate its road between its termini, but obtains it afterward by special grant from the municipality, and the thing thus obtained includes both the roadway and the franchise.

It is plainly the general policy of the law that property situated in one county or city should be taxable in that county or city for local purposes for its actual value, and that that local subdivision alone should have the benefit of this value for the purpose of raising its revenue. This, indeed, is the basis of all local taxation, and it is recognized by the section in question that the property which receives the benefit of local government shall pay its proportion of the expenses thereof, apportioned according to actual value. It would be a very anomalous condition of affairs, therefore, if a franchise granted by one municipality, and entirely local to that

municipality, should be assessed by a system which would permit a part of its value to be taken from the assessment of the municipality in which it is situated and transferred to another municipality, and there made the basis of an assessment for the benefit of that local government. Yet this is precisely what the proposed system would do. If the differences in the amounts were very small as compared to the whole, as could justly be said in the case of an ordinary railroad, perhaps this would not be a sufficient reason for supposing that the constitutional convention did not intend to include street railroads in the scheme. But a consideration of the different circumstances existing in the case of the respective classes of railroads, and the difference in the character of business transacted by them, shows that in the case of street railroads the difference in value would be very considerable. A street railroad in a city, as its name implies, operates its cars over the streets in common with the public, and as a part, and in furtherance, of the public use to which such streets are dedicated. The value of the system does not rest to any great extent upon the value of the space of ground which is occupied by the track. That space is also subject to general public use as a part of the street, and, considered merely as land, the interest of the railroad therein is of very little value. The valuable part of the privilege arises from the fact that the ground is already dedicated to public use, and is used for public travel; from the fact that it is situated on a public way along which persons are wont to travel from place to place, and that it is intended to facilitate this use and this travel by carrying persons to and fro along the street as they may desire. It is this local traffic from which the earnings of the company are derived. It is the existence of this demand and the opportunity to supply it by reason of its situation on and along the street which gives value to the privilege of using the street as a roadway. In this respect there is no similarity between a street railroad and an ordinary railroad. The latter does not do a local business, nor facilitate local travel along the street. If it occupies the streets at all, as it may do under permission of the local authorities, it is not for the purpose of serving a local use or travel from place to place along that particular street. It is in reality an obstruction to such local travel.

It uses the streets merely as a convenient route by which to reach its depot, and usually it takes the street instead of a right of way over private land, not from choice, but from necessity. Its use of the street has no relation whatever to the local public use, and the fact that it is on a street does not add to, but rather detracts from, the value for railroad purposes of that part of its roadway, and it adds nothing at all to the revenues received from the operation of the road.

It is easily seen that in the dense population of a city the value per mile of track of a street railroad must necessarily be very much greater than in the more sparsely populated country outside of the city. In the case of a street railroad operated partly within and partly without a city, whether in more than one county or not, it is evident that if the entire value of the franchise and roadway of the railroad as a whole is ascertained, and the amount divided between the portion inside the city and the part outside, in proportion to the length of track in each territory respectively, a large part of the value of property situated within the city would be arbitrarily taken from the city valuation and transferred to that of the county, thus, if the road is operated in more than one county, causing an injury to the city and a benefit to the county, which it cannot be supposed was intended. In this particular case, for instance, if the value of the eighteen miles of the plaintiff's franchise, roadway, roadbed, and rails in San Francisco is \$8,000 per mile and the five miles in San Mateo county is worth only \$4,000 per mile, the total value in San Francisco would be \$144,000, and in San Mateo county \$20,000, and the only fair and just assessment would be upon those values in the respective counties. But the average value per mile of the entire road would be approximately \$7,130, and, if valued by the arbitrary method provided in the Constitution, the result would be that \$15,655 of the value of the property within the city would be taken from the San Francisco assessment and added to that of San Mateo county, thus depriving the city of San Francisco of a part of the revenue to which it is entitled, and giving to San Mateo county revenue to which it has no just claim, and enabling the plaintiff to avoid city taxation to the extent of the difference.

The possibilities of escaping taxation in the particular case

here before the court may be of slight importance to the plaintiff, because the rate of taxation may be substantially the same in the city and county of San Francisco as in San Mateo county, but in the case of a railroad operated in a city situated far from the county line the method of assessing such a railroad operated in more than one county would enable such a road to escape taxation upon a large proportion of the value of its property. For instance, in the county of Los Angeles, a street railroad system having lines extending in many directions throughout the city of Los Angeles might run a branch outside of the city, but within the county, for a distance of thirty miles before reaching the county line. So long as it was operated only within the county it would be assessed according to its value in the city and county, respectively, by the assessor of that county for county and State taxation, and by the assessor of the city for municipal purposes. But, by extending the line for one mile beyond the county line, and thus making it a road operated in more than one county, the comparatively larger value of that part of the road situated within the city goes into the general sum, and becomes merely a part of the value of the entire system. The trackage within the city would then be valued at the average value of the entire system, which would be very much less than the real value of the mileage within the city. This much of the city values would, therefore, be taken from the city assessment and added to the assessment for county purposes, and to that extent the road would entirely escape assessment for municipal purposes. For instance, if the value of the tracks within the city was \$1,000,000, and the value of the tracks outside of the city \$500,000, the total length being sixty miles, one-half in the city and one-half outside, the average value per mile of the whole system would be \$25,000. By this plan the mileage within the city would be valued at only \$750,000, and the city would lose for assessment purposes \$250,000 of its value, and to that extent the railroad would escape taxation and the city would lose its legitimate revenue. We do not believe that the Constitution was intended to give the opportunity for such consequences, and for these reasons we think the section does not apply to street railroads.

There has recently come into existence a certain class of rail-

roads, known as "interurban roads," which are a sort of hybrid, having in some respects the characteristics of the ordinary railroad and in others those of the street railroad. Within the limits of the cities which they enter they usually pass along the streets, and perform the ordinary functions of street railroads, stopping where desired to let passengers on or off, and serving the public need for local street travel. Outside the cities, on their way from one city or town to another, they frequently travel upon a roadway obtained from private persons, not upon a public road, and stop, as in case of ordinary railroads, only at stations established by them for that purpose. They also often convey freight as well as passengers. Whether or not these railroads, when operated in more than one county, are to be classed as street railroads, or as ordinary railroads to be assessed by the State board of equalization, and, if the latter, whether they may be attached to a system of street railroads, and so make the entire mileage of such system subject to assessment by the State board, or must, for the purpose of such assessment, be limited exclusively to the part of the system traversed by the cars of the interurban line, are questions which do not here arise and need not be considered. The railroad in question is not one of this class.

The judgment of the court below is affirmed.

BEATTY, C. J., LORIGAN, ANGELLOTTI, and VAN DYKE, JJ.,
concur.

McFARLAND, J. (dissenting). I dissent, and adhere to the former decision and to the opinion then delivered (75 Pac. 575), and I desire to add only the following, which seems to be too obvious to be surmounted by any kind of reasoning: The word "railroad" is frequently used in the Constitution without any other defining or qualifying phrase, and where the meaning of the word, standing alone, comes in question in determining the application of some provision of the law, it is, no doubt, occasionally difficult to decide whether, in the particular matter involved, it should be construed to include "street railroad." But in the provision here in question—"all railroads operated in more than one county in this State"—the word "railroads" does not stand alone; the important, significant, and controlling part of the phrase is "operated in more than one county." The thought in the minds of the framers of the Constitution, as shown by the language used, was to provide for the assessment of a railroad, with its rolling stock, franchises, etc., running through and being operated in more than one county. And the thing intended to be provided for is, in its very nature, applicable to any railroad which is operated in more than one county.

I do not see the force of the suggestion that the dense population of a city makes a mile of track within it more valuable than a mile in a more sparsely settled country outside of the city. The same fact exists as to all railroads. The great overland railroads pass through counties which are thickly settled and cities having dense populations, and also through almost entirely unsettled mountain and desert regions, and the parts of these railroads lying within the former are more valuable than those lying within the latter. If they were divided, for the purpose of taxation, into sections corresponding with county and city lines, cities, and some counties, would receive more revenue from taxation of these roads than they do now. But under that system other evils would occur; and the constitutional convention, after a full consideration of the whole matter, determined that the more practicable, just, and equitable way was to tax each railroad operated in more than one county, with its rolling stock, etc., as a whole. This being the rule declared by the Constitution, it cannot be disregarded on the ground that it is not the best way to assess such a railroad.

HENSHAW, J., concurs.

State ex rel. Howard v. Hartford Street Railway Co.

(Connecticut — Supreme Court of Errors.)

CONSTRUCTION OF CROSSOVER SWITCHES; RIGHT OF ABUTTING OWNERS; 1

PUBLIC NUISANCE.—The defendant railway company constructed its tracks in the street under authority granted by the municipality, but built its crossover switches in front of the relator's property contrary to the plans as approved by the municipal authorities. The relator complained that the construction of such switches and the noise and vibration caused by the defendant running its cars over them caused great discomfort to him and his family, and sought by mandamus to compel the company to construct its tracks in conformity with the plans approved by the city council. It was held that, although the construction

1. Rights of abutting owners to compensation for the construction of street surface railroads in streets adjacent to their property is considered in the note to *Eustis v. Milton St. Ry. Co.*, 1 St. Ry. Rep. 311. The rights of abutting owners as affected by the construction and operation of street railroads is also considered in the following cases reported in this series: *Bork v. United N. J. R. & C. Co.*, 2 St. Ry. Rep. 727, (N. J. Eq.) 57 Atl. 412; *Paterson & S. L. Tract. Co. v. Wastbrock*, 2 St. Ry. Rep. 711, (N. J. Eq.) 56 Atl. 698; *Paige v. Schenectady Ry. Co.*, 2 St. Ry. Rep. 768, 178 N. Y. 102, 70 N. E. 213; *Child v. New York Elev. R. Co.*, 2 St. Ry. Rep. 806, 89 App. Div. (N. Y.) 598, 85 N. Y. Supp. 604; *Henning v. Hudson Valley Ry. Co.*, 2 St. Ry. Rep. 806, 90 App. Div. (N. Y.) 492, 85 N. Y. Supp. 111; *Schenectady Ry. Co.*

differed from that indicated by the plan, the company was not liable for the annoyance to an abutting owner; that the company's railway track cannot be deemed a public nuisance merely because in some detail of construction there is a departure from the plan approved; that while the city may compel conformity with the plans approved, it is not necessarily bound to do so; that the highway being lawfully occupied by the company's tracks the company is not liable for the annoyance caused by noise and vibration resulting from its cars passing over the crossover switches, since such annoyance is incident to a proper public use of the street.

APPEAL by relator from a judgment denying a peremptory writ of mandamus. Decided December 18, 1903. Reported (Conn.), 56 Atl. 506.

Edward B. Bennett, for appellant.

Lucius F. Robinson, John T. Robinson, and M. Toscan Bennett, for appellee.

Opinion by HAMERSLEY, J.

The relator claims a right to pursue this writ of mandamus on two distinct grounds: First, by reason of his interest, as a citizen of Hartford, in the enforcement of the legal duty the defend-

v. Peck, 2 St. Ry. Rep. 806, 88 App. Div. (N. Y.) 201, 84 N. Y. Supp. 759; *Younkin v. Milwaukee L., H. & P. Co.*, 2 St. Ry. Rep. 973, (Wis.) 98 N. W. 215.

Where the location and maintenance of a street railroad is authorized by the proper municipal authorities under a statute providing therefor, the company is relieved from the charge of maintaining a nuisance in the highway; and it becomes liable for interference with the highway only in case it fails to use proper care and skill in the construction of the railroad which it was authorized to build and maintain thereon. *Wood v. Third Ave. R. Co.*, 13 Misc. Rep. (N. Y.) 308, 34 N. Y. Supp. 698. The location as authorized and fixed by statute or ordinance must be followed, and if departed from in any material degree the company may be held liable for the maintenance of a nuisance. *Finch v. Riverside, etc., R. Co.*, 87 Cal. 597, 25 Pac. 765; *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 146, 36 Atl. 1107; *Commissioners v. South Bend, etc., Ry. Co.*, 118 Ind. 68, 20 N. E. 499.

A street railroad corporation operating its road in a city street is under an implied obligation to so construct and maintain its tracks as that, by the exercise of reasonable care and supervision on its part, no danger may be occasioned to the public in its use of the street, or to the owners of adjacent property. *Schild v. Central Park, etc., R. Co.*, 133 N. Y. 446, 31 N. E. 327.

Construction of branches and switches.—Under a statute authorizing a city to control its streets, a city council may allow the construction of a main

ant owes specially to that portion of the public represented by the city of Hartford; second, by reason of his interest as a stranger suffering special damage from the defendant's failure to perform the corporate duty alleged. The defendant, in its return, alleged a former judgment of the Superior Court denying a peremptory writ to enforce the precise specific duty the relator now seeks to enforce. The return, in connection with the reply, also put in issue certain material facts. Upon the trial below, the defendant claimed that the former judgment constitutes a bar to the relator's right to pursue this writ on the first ground, and that, upon the facts admitted and found by the court, the relator cannot maintain the action upon the second ground. The trial court supported these claims of the defendant, and, if this action is correct, the judgment denying the peremptory writ must stand.

line and also a proper spur track, connecting the main line with a point at which the company expected to build a power-house and shed to store its cars when not in use. *Powell v. Macon & I. S. R. Co.*, 92 Ga. 209, 17 S. E. 1027. A grant by a city to a street railway company to operate its road on the center of a certain street, authorizes a switch or side track in addition to the main line, where public convenience is promoted thereby. *Borough of Wyoming v. Wilkesbarre & West Side Ry. Co.*, 8 Kulp (Pa.), 113; *City of Houston v. Houston Belt & M. P. Ry. Co.*, 84 Tex. 581, 19 S. W. 786. Such necessary switches and turnouts are not obstructions of the street so as to warrant their summary and forcible removal by police intervention without notice or a hearing, unless it clearly appears that the authority to construct them has been exceeded. *Cape May v. Cape May, etc.*, R. Co., 60 N. J. L. 224, 37 Atl. 892, 39 L. R. A. 609.

Remedies for unauthorized or defective construction.—The unauthorized, continuous obstruction of a public highway is an act which in law amounts to a public nuisance, and a person who sustains a private and peculiar injury from such an act may maintain an action to abate the nuisance and to recover the special damages sustained. *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620; *Nichols v. Ann Arbor, etc.*, R. Co., 87 Mich. 361, 49 N. W. 538; *Van Horn v. Newark, etc., Pass. Ry. Co.*, 48 N. J. Eq. 332, 21 Atl. 1034; *Wakeman v. Wilbur*, 147 N. Y. 657, 663, 42 N. E. 341; *Larrimer, etc., St. R. Co. v. Larri-mer*, 137 Pa. St. 553. See also *Nellis Street Surface Railroads*, p. 245. Unless a particular injury is suffered by the individual, the question of the validity of the ordinance under which the street railroad company constructed and operated its road, and the fact that it failed to complete its road in conformity therewith, can only be raised by the State, or city granting the franchise. *Kitchell v. Manchester R. El. Ry. Co.*, 79 Mo. App. 340.

The history of this case, and the material facts as shown by the record before us, may be briefly stated thus: The defendant was authorized by the Legislature to construct and operate a double-track electric railway through Farmington avenue, in connection with a system of street railways authorized in the city of Hartford. In 1899 the defendant presented to the mayor and common council of the city of Hartford a plan showing the location and mode of constructing and operating the double-track railway it was authorized to construct in Farmington avenue. This plan was modified by the addition of certain conditions to be performed by the defendant, and adopted. The statute (Pub. Acts 1893, p. 308, chap. 169, §§ 2, 3) forbade the defendant to depart from this plan in constructing its railway, and gave to the city council control over the placing of the tracks in accordance with the plan, and power to order the removal of tracks not so placed, and authorized the enforcement of such order by writ of mandamus. *Hartford v. Hartford Street Ry. Co.*, 73 Conn. 327, 336, 47 Atl. 330. The plan thus adopted prescribed the precise portion of the highway to be occupied by the railroad structure, and provided that this structure should be built with four crossover switches, so called, connecting the two tracks, so that in case of necessity a car on one track may be transferred to the other track. This mode of constructing a double-track railroad is necessary to the most safe operation of the road, and to the most efficient service of public convenience. The place where each crossover was to be placed was designated by the plan. The defendant constructed its railroad in accordance with the plan, except that one crossover switch was built 950 feet east of Sigourney street, and in front of No. 116 Farmington avenue, instead of 420 feet east of Sigourney street, as required by the plan. The city council, in accordance with the provisions of the statute, ordered the defendant to remove the switch, and applied for a peremptory writ of mandamus commanding the defendant to obey this order. The mandate prayed for is thus stated in the alternative writ: "It is hereby required and enjoined of you, the said Hartford Street Railway Company, that before the first Tuesday of May, 1900, you remove said crossover located on Farmington avenue, in front of No. 116, as required by the said order of the mayor

and court of common council of said city of Hartford, and in all respects to obey said order, and conform to the laws of this State in regard thereto." With the exception of the date of performance, this is the same mandate asked for in the case now before us. The defendant moved to quash the alternative writ, and upon this motion being granted by the Superior Court, the city of Hartford appealed to this court.

We held that this difference in constructing the switch was enough to prevent the defendant from claiming a construction in substantial accordance with the plan, as against an order of the council enforcing its power of control; that mandamus would lie, on application of the city, to compel obedience to this order; and that the facts showing the legal duty of the defendant to obey the order were sufficiently alleged — reversed the judgment rendered on the motion to quash, and remanded the cause for further proceedings in the Superior Court. *Hartford v. Hartford Street Ry. Co.*, 73 Conn. 327, 47 Atl. 330. The defendant then made return, and the case was tried upon issues of fact. The trial court found the issues of fact in favor of the defendant, and further found that, in view of all the facts, a writ of peremptory mandamus, even if legally permissible, ought not to issue, and for this reason dismissed the alternative writ. Upon appeal by the city from this judgment, we held that in refusing to issue a peremptory writ the court did not pass the limits of its legal discretion, and that its action was not reviewable. In this connection we said:

"The writ of peremptory mandamus is an extraordinary remedy. Like other extraordinary remedies, it can be applied only under exceptional circumstances, and must, to a certain extent, be subject to judicial discretion. *Daly v. Dimock*, 55 Conn. 579, 590, 12 Atl. 405; *Chesbro v. Babcock*, 59 Conn. 213, 217, 22 Atl. 145. It appears from the finding that the duty imposed upon the defendant by law depends upon a construction of the language used in the vote of the court of common council approving the location, which cannot be said to be free from doubt until authoritatively established; that the interest of the city in the removal of the track in question, whether pertaining to it as a private corporation or as representative of public interest (except its vital interest in the prompt obedience of this defendant corporation to its lawful orders), was not substantial. On the contrary, it appeared that the track, in its present position, served, rather than injured, the public interests; that the track was placed by the defendant in pursuance of the

direction and approval of the city officials charged by law with the execution of the orders of the council in respect to highways, in the well-grounded belief that, as thus placed, it complied with the directions of the court of common council. Such conditions do not necessarily exclude discretion. Certainly extreme caution should be used in denying a writ which the court may lawfully issue, but we cannot say that in this case there has been such a plain misconception of sound discretion as would render the judgment erroneous. Some of the other errors assigned invite question. Apparently full effect was not given to the scope of our former decision, but the errors are not material, in view of the ground on which the judgment stands." *Hartford v. Hartford Street Ry. Co.*, 74 Conn. 194, 196, 50 Atl. 393.

The real parties to this former action were the city of Hartford — a territorial municipal corporation acting specially in behalf of that portion of the public composed of its inhabitants — and the present defendant. The cause of action tried and determined involved the right of this portion of the public to a peremptory writ of mandamus compelling the defendant to obey the order of the city council. The court has adjudged that such right does not exist. Whether this conclusion is reached because it has found that no duty of obedience has been violated, or because it has found that such an enforcement of a nominal duty would work injustice to the defendant, without benefit to the public, and would, therefore, be inequitable, it is a final adjudication of the real cause of action upon its merits. No question of a possible right, upon a change of circumstances, to again apply for a writ denied because its issue would be inequitable, is involved in this case. An adjudication of an application for a peremptory writ of mandamus upon its merits comes within the principle of *res judicata*, and is a bar to another application for the same writ by the same party. *Regina v. Pickles*, 3 Q. B. 599, note.

In so far as each inhabitant of the city of Hartford was entitled to make the application made by the city, he was a party to that application, and is barred by the judgment therein. If the application be regarded as an ordinary action by the city in its corporate capacity, each inhabitant is by our law regarded as a party to the suit. *Beardsley v. Smith*, 16 Conn. 368, 380, 41 Am. Dec. 148. The application of the relator, as a citizen of Hartford, in the present case, alleges substantially the same fact,

and asks for the same writ denied by the former judgment, and that judgment is a bar to this action.

Mandamus will never issue to enforce a private right. To justify its issue to compel a private corporation to do a particular act, it must appear that the act is in the nature of a corporate act specially commanded by law; and, in general, it will issue only at the instance of the public, or of some person entitled to represent the public, including the individual in respect to whom the act commanded is to be done, or of some person who, though a stranger to the corporation and to the public interest, suffers an infraction of his private right at the hands of the corporation in doing the act forbidden or not doing the act commanded; and in this latter case the mandamus compelling performance of the corporate duty should be an effective remedy for the infraction of the private right, and must be the only full and adequate remedy for that infraction. *American Asylum v. Phoenix Bank*, 4 Conn. 172, 178, 10 Am. Dec. 112; *Tobey v. Hakes*, 54 Conn. 274, 275, 7 Atl. 551, 1 Am. St. Rep. 114.

The second ground on which the relator claims the right to pursue this writ involves the application of these general principles to the facts alleged by the relator and found by the court. The grievance of Mr. Howard, the relator, against the defendant, for which he claims a right of legal redress, is this: Mr. Howard which he claims a right of legal avenue, as the home of himself and family. The defendant's railroad tracks, placed on Farmington avenue in front of his residence, are constructed with a crossover switch; and, by reason of the proximity of his home to the railroad thus constructed, the noise and vibration caused by the defendant running its cars over these tracks is an annoyance to said Howard, causes great discomfort to him and his family, and greatly disturbs and interferes with the comfort and quiet enjoyment of his home. Assuming that the annoyance thus suffered by Mr. Howard is one for which the defendant is legally liable to him, we do not think that it furnishes, in connection with the other facts found, legal reason for the issue at the instance of Mr. Howard of the peremptory writ of mandamus he asks for in his application. The relator's argument in support of his contention is based mainly, if not wholly, upon the assump-

tion that inasmuch as the construction of the railroad tracks with four crossover switches, authorized by the Legislature and approved by the city council, differed in detail of execution from the plan approved by the council, in that one crossover switch connected the two tracks at a point 500 feet distant from that indicated on the plan, that particular switch was, when placed on the street, and has ever since remained, a public nuisance, in the sense of being an unlawful obstruction or encroachment upon the highway. The relator's argument is that, the switch being a public nuisance of this kind, the annoyance suffered by him is a special damage caused by the nuisance, entitling him to its abatement, and, therefore, he has a legal right to demand the issue of a writ of mandamus commanding the defendant to obey the order of the city council. Whether this argument is sound or not, we think the assumption on which it is based is incorrect. It may be that a railroad structure of this kind, placed in the highway, is an unlawful obstruction, unless its location and mode of construction are submitted to and approved by the council; and it may be that after such approval a road can be located and constructed in such utter disregard of the plan approved as to be, in effect, a road built without submission or approval. But it cannot be that a railroad authorized by the Legislature, approved in its location and mode of construction by the council, and built in substantial accord with that approval, is a public nuisance, merely because in some detail of construction there is a departure from the plan approved. And it cannot be that a particular part of the structure so built, which differs in detail from the mode of construction indicated by the plan, is, for that reason only, a public nuisance, although the difference may be sufficient to justify the council in ordering the part to be removed, and the construction made to conform to the plan. For instance, in a plan before us the railroad ties are required to be of oak or chestnut wood, and the steel rails to be of a specific weight. Can it be that any tie of a different wood, or any rail of a different weight, is, for that reason only, an unlawful obstruction on a highway, and so for that reason a public nuisance? Such effect cannot reasonably be given to the legislation regulating the novel and peculiar situation arising from the relation of the defendant corporation and

the city to each other and the highways. That legislation recognizes a railroad structure as a part of the highway, furthering the identical public use of common travel for which the highway was established, unless authorized for a different purpose, or constructed and operated so as to be perverted to a different purpose, and to invade property rights without compensation. *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 146, 154, 36 Atl. 1107; *New York, N. H. & H. R. Co. v. Fair Haven & W. R. Co.*, 70 Conn. 610, 615, 40 Atl. 607, 41 Atl. 169. It provides for the construction and maintenance of highways thus combining facilities for travel in vehicles requiring a tramway for their use and in those which do not, by two agents of the State, viz., the municipality and the railroad corporation, and regulates their relations to each other and to the highway. Before commencing the construction of the tramway, they must come to an agreement as to the mode of construction, and any conditions of assent to the particular plan involving obligations on the part of the railroad company such as the municipality may properly require. In directing construction in accordance with the plan thus agreed upon and adopted, the municipality is the superior and the railroad company is the subordinate; and the Legislature provides modes of enforcing obedience to the lawful orders of the superior, but it does not, as by legislative mandate, command the parties to follow the precise mode of construction indicated in the plan. On the contrary, the whole discretion as to mode of construction, whether in adopting a plan or in executing one adopted, is vested in the parties. In making the discretion of the railroad subject to that of the city, and providing efficient means whereby the latter can enforce obedience, the law makes full provision for any departure from the plan, in detail of construction, by the railroad without assent of the city, but does not directly or impliedly declare that by the mere fact of such departure the tramway, or any part of it, ceases to be a constituent part of the highway, facilitating its use for public travel, and becomes a mere lawless obstruction to that travel. If the railroad company, in some detail of construction, departs from the plan adopted, the city has the power to compel conformity, but is not necessarily bound to do so. It is within its discretion to ratify the variation

by a formal change of the plan in the manner provided, if not by informal acquiescence; and, even when the council has issued an order of conformity, the city is not necessarily bound to enforce that order, either by writ of mandamus as authorized by the statute, or by itself doing the work at the expense of the company. It is still within its discretion to ratify the change.

It may be doubtful whether the duty resting on the railroad company of exact conformity with the plan in detail of construction is a corporate duty that can be enforced by mandamus, except at the instance of the city, as specially authorized by statute. There certainly is an apparent distinction between the duty thus subject to the discretion of the city, and that absolute corporate duty created by legislative command to do or not to do a specific thing. It is not, however, necessary to the determination of the present case to solve that doubt, and we leave the question an open one.

The annoyance of which the relator complains is that caused by public travel in a public highway. The highway is lawfully constructed with a double-track railroad for the accommodation of that travel. The railroad is constructed with crossover switches, found to be a reasonable construction for the safety and convenience of that travel. The aggravation of noise and vibration when this travel passes over a crossover switch is the precise annoyance which the relator alleges as entitling him to legal redress against the defendant. It is found, and it is obvious, that such annoyance is incident to the public use of the highway; and the defendant, either as a private corporation, or as agent of the State in maintaining the highway fit for that use, is not liable to the person so annoyed. It further appears that the annoyance from travel passing over a crossover switch is felt most keenly by those living in close proximity to the switch, and that, if the defendant obeys an outstanding order of the city council, the relator will, for the time being, be relieved from the stress of the annoyance. The defendant is not liable for an annoyance of this kind, because such annoyance is an incident to the use of the highway for public travel, and is not made liable because, through its disobedience of the council's orders, it happens to fall with greater stress upon the relator than upon his

neighbors. It is the nature of the annoyance, as a necessary incident to the public use of the street, and not the defendant's obedience to the council's order, which determine its liability to those who happen to suffer most by the annoyance.

The relator seems to claim that the annoyance suffered by him is not merely an ordinary incident to the use by the public of a highway constructed with a double-track tramway and a cross-over switch, but that, owing to physical or other conditions existing at this particular place, it is peculiar and exceptional, and so injurious to his right to the quiet enjoyment of his home that the Legislature, in authorizing a street railway, cannot be held to have authorized its construction in such manner at this place, or that the Legislature itself cannot authorize such an invasion of his rights of property without compensation. If this claim is well founded, the relator has a grievance against the defendant, and is entitled to legal redress, but such right does not entitle him to a writ of mandamus commanding the railroad to obey the order of the city council. His private right cannot be enforced without establishing the absolute illegality of such construction of the highway at this point, whether built with or without the joint action of the defendant and the city council. This question is not involved in an application for the writ. That is based upon the defendant's failure, in thus constructing the road, to conform with the agreement between itself and the city, adopted for defining the mode of construction. If it appears that the defendant has conformed to the agreement, notwithstanding the construction invades the clear legal right of the relator, the writ asked for cannot issue. Moreover, if pending the application the city council sees fit to exercise its power and discretion by rescinding the order, the writ cannot issue. There is then nothing upon which it can operate, although the invasion of the plaintiff's rights remains unchanged. An ordinary action in equity will, however, furnish a complete remedy for testing the existence of such a wrong to the relator, and giving the relator full and adequate redress. This of itself is a conclusive answer to any application for the extraordinary remedy by writ of mandamus.

These considerations go to the root of the relator's right. The

law is so that neither upon the facts found by the trial court, nor upon any state of facts claimed or suggested by counsel, can this writ of mandamus be issued at the instance of the relator. It is, therefore, needless to consider other errors assigned.

There is no error in the judgment of the Superior Court.

The other judges concurred.

Monroe v. Hartford Street Railway Co.

(Connecticut — Supreme Court of Errors.)

1. VIOLATION OF CITY ORDINANCE; PROXIMATE CAUSE OF INJURY.—The plaintiff's horses and wagon were injured by a collision with one of the defendant's street cars. It appeared that the plaintiff had left the horses and wagon standing unhitched in violation of a city ordinance.¹ It was held that such a violation does not preclude recovery for injuries sustained unless such violation was a proximate cause contributing to the injury.
2. INSTRUCTION AS TO VIOLATION OF ORDINANCE.—Whether or not the violation of an ordinance is the proximate cause of the injury is a question of fact for the jury under proper instructions from the court; so that an instruction erroneously construing and applying such ordinance is material and harmful, and sufficient cause for reversal.

APPEAL by defendant from judgment for plaintiff. Decided December 18, 1903. Reported (Conn.), 56 Atl. 498.

The plaintiff was the owner of a pair of horses and wagon, used for the daily delivery of milk upon a route including Asylum avenue, in the city of

1. Leaving horse unhitched in street.—If the driver of a team stops it in a dark alley and leaves it upon the track of a street railway unhitched and unattended, he is guilty of negligence and there can be no recovery against the railway corporation for injuries suffered by a collision of one of its street cars with such team, although the motorman of the car was guilty of negligence in running it at a rapid rate of speed through such alley. *Gilmore v. Federal St. Ry. Co.*, 153 Pa. St. 31, 25 Atl. 651, 34 Am. St. Rep. 682. But see *Albert v. Bleecker St. R. Co.*, 2 Daly (N. Y.), 389, where it appeared that an expressman left his horse and wagon untied in a street while he went to deliver a parcel; there was not room between the curbstone and the defendant's street car track for the wagon to stand and allow a car to pass. A collision

Hartford, and driven by his servant, Brewer. The defendant operated an electric railroad upon Asylum avenue. At the time of the injury complained of, the plaintiff's team was standing across Asylum avenue, with the wagon upon the tracks of defendant's railroad, the plaintiff's servant, Brewer, being at that time in the kitchen of a neighboring house occupied by one Pattenden. While thus standing, the wagon was struck by a car of defendant, thrown off the track, and the wagon and its contents injured. The complaint charges the defendant with negligence, in that it "negligently struck said wagon, as it was standing stationary on said tracks," while "running a car at a high rate of speed." The testimony affecting the claimed negligence of the defendant's motorman in permitting the car to strike the wagon, as well as the testimony affecting the claimed negligence of Brewer in permitting his team to stand across the tracks, was somewhat contradictory. It appeared that the plaintiff's horses were gentle, intelligent, accustomed to the milk route, and to standing unattended in front of houses of customers while the driver delivered the milk put up in bottles; that in this instance Brewer left the horses unhitched and unattended, while he was in Pattenden's house for the purpose of delivering milk and immediately returning as usual; that he remained in the house for the purpose of looking up and settling Pattenden's milk account, consuming much more time than usual, and on coming out of the house heard the crash of collision. The evidence was conflicting as to the actual time spent in the house, Brewer stating it was ten or fifteen minutes, and other witnesses estimating it was a less time. The defendant claimed that the conduct of Brewer in thus leaving the horses and remaining in Pattenden's house was negligence contributing to the accident, and also constituted a violation of law contributing to the injury, and that such illegal conduct, if found to be

ensued causing damages for which the expressman sued; it was held that it was not negligence *per se* to leave the horse untied in the street under the circumstances.

A street railway company is liable for an injury to a horse and wagon left standing in a city street so close to the street railway track as to be struck by a passing car, when the motorman either saw the position of the wagon, or could have seen it, by the use of proper care, in time to have stopped the car. *Higgins v. Wilmington City R. Co.*, 1 Marv. (Del.) 352, 41 Atl. 86. Where plaintiff was unloading a piano from a wagon, and waited for two street cars to pass, and then backed his wagon against the curb with the horse standing on the tracks, and sent a man down the street to signal any car that might approach; and afterward a car came without giving any warning at an unusual rate of speed, and although the motorman had an unobstructed view for three or four blocks and was given notice to stop, he struck the horse and wagon, and injured the plaintiff, it was held that a verdict for the plaintiff should be sustained. *McFarland v. Consolidated Traction Co.*, 204 Pa. St. 423, 54 Atl. 308.

a proximate cause of the injury, is a conclusive bar to the plaintiff's right to recover in this action, and not merely evidence of contributory negligence; and in this connection produced in evidence an ordinance of the city of Hartford which declared "leaving any horse unhitched * * * within any street or thoroughfare of said city" to be a nuisance, and punished such act by a fine of \$5. The plaintiff controverted these claims, and, in addition to the evidence above mentioned, produced evidence tending to prove that the horses were so trained that they could take pretty good care of themselves in the street without a driver, and could swing the wagon round in the street better than it could be done by some drivers. In view of these claims upon this state of the evidence, the trial court instructed the jury as follows: "There is another element which enters or may enter into this case so as to affect the verdict which you can lawfully render in this case. This aspect of the case arises out of the ordinance of the city of Hartford relative to leaving any horse unhitched. Now, there is some ambiguity in the language of the ordinance in respect to the particular portion of the ordinance on which the claim in this case is made, which reads as follows: 'Permitting any animal to go at large in any highway or public place in the city or leaving any horse unhitched, or permitting any animal, wagon, or cart to stand upon or over any crosswalk, by the person having control at the time of the same, within any street or thoroughfare of said city'—and the ordinance declares that a nuisance, and forbids it. I instruct you that that part of the ordinance applies to leaving a horse unhitched within any street or thoroughfare of said city—that is, the city of Hartford. Such an ordinance must receive reasonable interpretation. It is not true as matter of law that, in order to be free from a violation of the ordinance, a person having a horse on the street is obliged to hold the reins in his hand or hold the horse by the bit all the time that the horse remains unhitched on the street, but the horse must not be allowed to remain unhitched without at the same time being in the effective control of some person. What is effective control will largely depend upon the facts of the particular case. If the horse is timid and inexperienced, a different kind of control would be required than would be required in the case of a horse which is reliable and trained to submit to the control of his attendant. It is for you to determine under the circumstances of this case whether the horses were left by the driver, Brewer, unhitched and beyond his control. If you find that the horses remained on the street unhitched, but at the same time under the effective control of the driver, then there was no violation of the ordinance, and the claim of a violation falls to the ground. If you find that there was a violation of the ordinance, you will then inquire whether that violation directly contributed to the injury, and, if you find that the ordinance was violated by the driver and the violation directly contributed to the injury, the law is so that the plaintiff cannot recover in this action, and your verdict should be for the defendant." The reasons of appeal, among others, assign error in the portion of the charge above quoted, and in the admission of evidence.

John T. Robinson, for appellant.

Edward M. Day and *George B. Thayer*, for appellee.

Opinion by **HAMERSLEY, J.**

The purpose of the city ordinance is obvious. It assumes that any horse in a city street without a driver or keeper is a source of danger to the person and property of those using the street unless the horse is hitched, and that injury to such persons may be the natural result of leaving an unhitched horse in a city street. For the protection of such persons and the prevention of such injuries, it makes the act of leaving any unhitched horse in a city street a misdemeanor punishable by a fine. *State v. Keenan*, 57 Conn. 286, 18 Atl. 104. It is also obvious that the evil provided against includes not only the permanent or indefinite abandonment of a horse, but those temporary departures which are most likely to frequently occur if not forbidden. The meaning of the language used to accomplish this obvious purpose is clear. There can be no reasonable doubt as to the meaning of "unhitched," used in this connection, and very little as to "leaving." Certainly going away from the horse beyond sight, hearing, and reasonably immediately reach is "leaving" it within the meaning of the ordinance. When an unhitched horse has been thus left the ordinance has been violated, whether the horse is gentle and well trained or not.

In his charge the trial judge adds to the ordinance a condition of violation not expressed by its language nor included in its purpose, and tells the jury that it is not enough to find that the horse is unhitched in the highway, and that it has been left in this condition by its driver, but they must also determine whether the horse unhitched, and so left by its driver, is still within his control, and that the kind of control which a driver may retain over a horse he has left unhitched in the street is a question of fact for them to settle. The court says: "It is for you to determine under the circumstances of this case whether the horses were left by the driver, Brewer, unhitched and beyond his control." The kind of control which the jury are thus invited to find from the particular circumstances of the case appears to be that which a

driver may be said to possess over horses after he has left them, and until his return, when the horses have been accustomed to stand still while so left. Possibly the trial judge may have intended merely to instruct the jury that Brewer did not leave the horses, within the meaning of the statute, if in fact he remained so near as to substantially retain the physical ability to watch their movements and intervene at once in case of necessity. But certainly the jury might, and probably did, understand him differently. Reading this passage in connection with the remainder of the charge, the state of the evidence, and the claims made, it seems clear that the jury must have understood the court to instruct them that leaving the horses unhitched did not violate the statute, unless, under all the circumstances of the particular leaving, they should be satisfied that his conduct was negligence; in other words, the jury was practically instructed that the ordinance only prohibited negligently leaving a horse unhitched in the street. This instruction, in view of the state of the evidence and claims made, was inaccurate and inadequate. It was, however, harmless, if a violation of the ordinance could not be a proximate cause of the injury alleged; and a new trial should not be granted unless it is clear, as a matter of law, that when a driver has left his horse in the street unhitched, and a collision between his team and another vehicle occurs directly after he has left them, and near the place where he has left them, this unlawful act of his may be a proximate cause of the injury inflicted by the collision. We think it clear that such an unlawful act may be a proximate cause of such injury.

There is some real and more apparent conflict of opinion in the many cases treating of the relation between an illegal act and a coincident injury. In doing an unlawful act a person does not necessarily put himself outside the protection of the law. He is not barred of redress for an injury suffered by himself, nor liable for an injury suffered by another, merely because he is a lawbreaker. In actions to recover for injuries not intentionally inflicted, but resulting from a breach of duty which another owes to the party injured, commonly classed as actions for negligence, the fact that the plaintiff or defendant at the time of the injury was a lawbreaker may possibly be relevant as an incidental cir-

cumstance, but is otherwise immaterial, unless the act of violating the law is in itself a breach of duty to the party injured in respect to the injury suffered. Ordinarily, in actions of this kind, the breach of duty is a failure to exercise, in conduct liable to be dangerous to others, that care which a man of ordinary prudence would exercise under the particular circumstances of the case. But the State regards certain acts as so liable to injure others as to justify their absolute prohibition. In such case doing the forbidden act is a breach of duty in respect to those who may be injured thereby. The cause of action which arises upon an injury resulting from a breach of duty, in respect to the party injured, in neglecting to use that care which the law requires, under the particular circumstances of the case, for the protection of those liable to be injured by such neglect, is the same as the cause of action arising upon an injury resulting from a breach of duty, in respect to the person injured, in doing an act forbidden by statute, for the protection of those liable to be injured through such act. The main distinction lies in the method of proof. In the former case, the breach of duty must be established by showing a want of due care under all the circumstances; in the latter case, it may be established by proving the commission of the illegal act. In both cases two questions are presented: First, was there a breach of duty in respect to any person liable to be injured by the conduct proved? Second, was this breach of duty a proximate cause of the injury alleged? And the principles which determine the relation of the negligent conduct in the one case, or the illegal act in the other, to the resulting injury as a proximate cause, are the same. This view of the law is fully established by our decision in *Broschart v. Tuttle*, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33.

Applying the principles which determine the causal relation between a negligent act and the following injury to the admitted facts in the present case, it is apparent that the illegal act was not necessarily a mere independent concomitant or condition of the collision, but might well be a contributing cause, and might be, according as the jury should find the attendant or surrounding circumstances, a proximate cause of the injury. "Cause" and "consequence" are correlative terms. One implies the other.

When an event is followed in natural sequence by a result it is adapted to produce or aid in producing, that result is a consequence of the event, and the event is the cause of the result. It is the nature of a horse, whether vicious or not, when at large in a public highway, to be a source of danger to those using the highway. And the unlawful act of letting a horse into the highway is adapted to aid in producing an injury received by a child playing in a highway from a horse thus left loose, and the unlawful act may be the cause, and proximate cause, of such injury. *Baldwin v. Ensign*, 49 Conn. 113, 115, 44 Am. Rep. 205. It is the nature of a horse harnessed to a wagon, and left without any keeper or restraint in a city street, to be a source of danger to those using the street; and when the driver of a team used in delivering ice from house to house negligently leaves his horses unrestrained while going from the sidewalk to the adjoining post-office for his mail, and the horses thus released from control go on their way through the street, that negligent act of the driver may be the cause, and proximate cause, of an injury received through the collision of the ice cart with another vehicle in the street. *Loomis v. Hollister*, 75 Conn. 718, 55 Atl. 561. And so the illegal act of leaving horses harnessed to a wagon unhitched is adapted to aid in producing a collision resulting from the horses, thus left unrestrained, pursuing their own way through the street. It is for this very reason that the State makes the act illegal. When the resulting collision follows such illegal act in natural sequence, the act is a cause of the collision, and if the sequence is direct and unbroken by any independent, intervening cause, may be the proximate cause. Whether or not, under all the circumstances of the case, it is the proximate cause, is a question of fact for the jury, under proper instructions from the court. The fact that the plaintiff's servant had violated the city ordinance was, therefore, one upon which the plaintiff's right of recovery might depend, and the error of the trial court in the instructions given upon the meaning of that ordinance is material and harmful.

Upon the trial the defendant produced as a witness one John H. Carlson, who was formerly in its employ, and was in charge of the car as motorman at the time of the collision. Carlson testified to facts and circumstances tending to show that his con-

duct was not negligent. Upon cross-examination the plaintiff drew from him an admission that while employed by defendant as motorman upon another line he had some trouble in respect to his management of a car. The defendant objected to the questions by which this admission was obtained, and duly excepted to the ruling of the court admitting the questions. The fact elicited by the plaintiff's questions was plainly irrelevant and immaterial, and we do not see how in this case such questioning could serve any legitimate purpose of cross-examination. But if the only effect of the error was the admission of an insignificant bit of irrelevant and immaterial testimony, it is not ground for a new trial. Inevitably such testimony to some extent creeps into most trials, and the granting of new trials for such errors would not further, but would seriously obstruct, a just determination of the rights of litigants. If, however, as is claimed by defendant, the course of proceedings as detailed in the record shows that the evidence was admitted under such circumstances that the jury might properly infer an instruction from the court that in determining the only negligence alleged, that is, a failure to exercise ordinary care in the management of a car at the time of accident, they were at liberty to consider facts tending to prove negligence in the selection of competent servants, the error would be a fatal one. It is unnecessary to consider whether this claim of the defendant is fairly supported by the record, inasmuch as a new trial must be granted for error in the charge.

The other errors assigned in the appeal do not call for special mention.

There is error, and the judgment of the Court of Common Pleas is set aside, and a new trial granted. The other judges concurred.

Hayden v. Fairhaven & Westville Railroad Co.

(Connecticut — Supreme Court of Errors.)

1. **INJURY TO PEDESTRIAN BY COLLISION WITH RUNNING-BOARD OF CAR WHILE ON SIDEWALK; DEGREE OF CARE.**—The plaintiff while standing on the sidewalk near its edge was struck by the running-board of one of the defendant's street cars which overlapped the edge of the sidewalk. The running-board projected over the curbstone and sidewalk a distance of twenty-five inches while the car was rounding a curve. The car was one in ordinary use in the city where the accident occurred. It was held that it was the duty of the plaintiff to exercise some care to avoid collision, although standing as he did upon the sidewalk he would not be required to exercise the degree of care required of him if he were standing in the street. An instruction to the effect that being on the sidewalk he was in duty bound in order to avoid danger to himself to exercise such care as would be exercised by a reasonably prudent man under all the circumstances, was held proper.
2. **DEGREE OF CARE TO BE EXERCISED BY DEFENDANT.**—Where the running-boards of street cars overlap the edge of the sidewalk, it is the duty of the motorman to use reasonable care to avoid injury to persons on the sidewalk at places where there is such overlapping of the running-board; and reasonable care may mean great care, depending upon the circumstances, and the greater the overlapping, the greater the degree of care which must be exercised. An instruction to this effect was sustained.
3. **USE OF STREET CAR WITH RUNNING-BOARD.**—The mere use of a street car with a running-board in streets so narrow that such boards overlap the sidewalk does not of itself constitute *prima facie* negligence.

APPEAL by plaintiff from judgment for defendant. Decided January 6, 1904.
Reported (Conn.), 56 Atl. 613.

Henry G. Newton, Harrison Hewitt, and Phelps Montgomery,
for appellant.

Harry G. Day and Henry F. Parmelee, for appellee.

Opinion by TORRANCE, C. J.

(Omitting discussion as to practice on appeal.)

It remains to consider the case upon its merits. The reasons of appeal are based upon claimed errors in the rulings upon evidence and in the charge.

The material facts claimed to have been proved by the plaintiff may, in substance, be stated in this way: The defendant operates street railway lines in, and runs electric cars through, State and Elm streets in New Haven; and Elm street runs in a north-westerly direction from State street, and at right angles thereto. About 5 o'clock in the afternoon of August 14, 1902, the plaintiff, in conversation with one Comstock, was standing on the sidewalk, on the northwest corner of Elm and State streets, about twelve inches from the edge of the sidewalk, facing away from Elm street, and partly up State street. There was then at this corner an electric-light pole and a police telephone box, about six feet apart, and the plaintiff stood between them. The running-boards of certain of the cars used by the defendant on its lines running round this corner — that is, the running-boards of the long, double-truck cars — overlapped the sidewalk at one point a distance of two feet; but the plaintiff offered no evidence as to how far such boards overlapped the sidewalk where he stood, "except the fact that plaintiff was struck by the running-board of a car." There was a great deal of travel at this corner, and cars were passing there at least once every minute, and bells were being constantly rung on such cars. Just before the accident to the plaintiff a short car passed the plaintiff safely while he stood as above described. Shortly thereafter one of the long cars came down State street, approached said corner, slacked its speed, rang its gong, and passed around said corner slowly. The front and about one-half of the body of the car passed the plaintiff in safety, "when the running-board of said car, at or near the middle of the car, as the car rounded the curve, struck the calf of the plaintiff's leg, causing serious injuries to him and endangering his life. The car was not stopped after the injury, but continued on its course." Such is the plaintiff's case.

The defendant claimed to have proved, in substance, these facts: That its charter authorized it to build and operate said railway lines. The tracks were built upon the layout and according to the plan approved by the city authorities, in the manner required by law. Owing to the presence of a double-track railway in State street, leading into Grand avenue, "it was impracticable to place said railway tracks so that the cars used thereon would overlap

said sidewalk less than they in fact did." The radius of the curve opposite the point of the corner "was flattened to 100 feet, to diminish the overlap as much as possible." The car that struck the plaintiff was of a kind in common use in New Haven and elsewhere. Their use had become necessary, owing to the increase of traffic. They had been used on the lines in question for three or four years, and elsewhere for four or five years, and public necessity and convenience required their use on the lines here in question. When upon a straight track the running-board of such car projected about nineteen inches beyond the rail, and at the place of the injury the running-board, at the center of the car, extended forty-two inches outside of the rail. At the point where the overlap was greatest at this corner the running-board projected over the curbstone and over the sidewalk for a distance of twenty-five inches. The amount of said overlap constantly diminished after the car passed that point, and as it approached the place where the plaintiff stood. The overhang at the point where plaintiff claimed to have been standing was very little, "but, owing to said point not being exactly determined, it was impossible to prove the exact amount thereof." The defendant also claimed to have proved that it had been guilty of no negligence as alleged in the complaint, and that the plaintiff, in remaining in a position of danger after due notice of the approach of the car, had been guilty of contributory negligence. Such, in brief, was the defendant's case.

The plaintiff requested the court to charge the jury as follows: "(a) Plaintiff had a right to stand on the sidewalk, conversing, and was not under obligation to watch lest trolley cars should extend over the sidewalk and strike him. (b) If defendant operated a car which extended over the sidewalk, it was bound to the utmost care and diligence to prevent any injury thereby to any person standing on the sidewalk. (c) If the defendant operated a car which extended over a part of the sidewalk, it was bound to see to it that no injury occurred to any person standing on the sidewalk. (d) If the plaintiff, while standing on the sidewalk, was injured by the car of the defendant, he is entitled to recover, unless you find that he willfully incurred the injury or was grossly negligent. (e) Defendant had no legal right to so

maintain its tracks and run its cars as to do injury to persons standing on the sidewalk, and therefore your verdict must be for the plaintiff, unless you find that the plaintiff willfully courted the danger, or was grossly negligent. (f) If the jury find that the defendant was in fault, they may assess punitive damages, and may take into consideration plaintiff's expenses in the trial of this case."

Some of the reasons of appeal are based upon the failure of the court to instruct the jury according to the import of these requests. The last request is of no importance upon this appeal, inasmuch as the verdict was for the defendant; but, clearly, as the complaint alleged no malicious, culpable, or wanton misconduct on the part of the defendant, but merely that its servants were negligent in improperly operating the car, the plaintiff was not entitled to punitive damages. *Maisenbacker v. Society Concordia*, 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213.

Request "a" in effect asked the court to charge the jury that, because the plaintiff was on the sidewalk, he was under no duty to exercise reasonable care with reference to the approach of a car around the curve in question. We think the court did not err in failing so to charge. Standing where the plaintiff did, so near the edge of the sidewalk, it was, we think, his duty to exercise some degree of care with reference to the street traffic. He was not, standing there, as free from all duty with regard to that traffic as he would have been in bed; yet that is substantially the import of this request. Standing in the street, it would have been his duty to exercise a higher degree of care, perhaps, than would be required of him on the sidewalk; but even on the sidewalk he is not entirely free from the duty to exercise some care with reference to street traffic. Whether on street or sidewalk, he was bound to exercise some care; the degree of care varying with the circumstances. In short, he was bound, standing where he did, to exercise such care as would be exercised by a reasonably prudent man in like circumstances; and this is just what the court charged. It said: "The law also requires the traveler upon the highway to exercise reasonable care to avoid injury to himself; and this plaintiff, on this sidewalk, to avoid danger to himself, was in duty bound to exercise such care as would be

exercised by a reasonably prudent man under all the circumstances." This was the only instruction that could properly be given for the guidance of the jury upon the point in question, and, applying this instruction to the facts as they should find them, it was sufficient for their guidance in determining whether the plaintiff acted as a reasonably prudent man would have acted under like circumstances.

Requests "b," "c," and "d" may mean that the defendant was bound to exercise toward the plaintiff the same degree of care it would be bound to exercise toward one of its passengers, or they may mean that it was bound to exercise toward him such a degree of care as a reasonably prudent man would have exercised under the circumstances. If they mean the former degree of care, we think the court was justified in refusing so to charge, while, if they mean the latter, that is just what the court told the jury, as is shown by the charge upon this point hereinafter quoted. In either case the plaintiff has no cause to complain upon this point. Besides, these requests seem to imply that the plaintiff was himself under no duty to use reasonable care. The court did not err in not charging them.

Request "e," as a whole, the court was not bound to charge, for the reasons given with reference to requests "b," "c," and "d." The court did charge the first part of this request, in substance, and properly refused to charge the last part.

Coming, now, to the charge as made, as to the degree of care required of the defendant, the court charged in substance as follows: It was the duty of the defendant, in running its cars on the highway, to use reasonable care to avoid injury to persons using the highway; and what is reasonable care depends upon the circumstances of the case; and, as the danger of accident increases, the degree of care should also increase. It was the duty of the defendant to the plaintiff to exercise such care as would be exercised by a reasonably prudent man under all the circumstances. At places where there is more danger the speed must be greatly reduced, and the gong should be sounded to give warning; and if the defendant company was operating a car, the running-board of which, at curves, extended over a part of the sidewalk, it was its duty to use reasonable care and diligence to

prevent injury thereby to any person standing on the sidewalk at such place; "and it is the duty of the motorman operating such car to use reasonable care to avoid injury to persons on the sidewalk at places where there is such overlapping of the running-board; and reasonable care may mean great care, depending upon the circumstances, and, the greater the overlapping, the greater degree of care must be exercised. It is his duty to avoid injury to persons lawfully using the public street, whether crossing it or whether on the sidewalk." We think this was a fair statement of the law relating to the duty of the defendant and its servants toward the plaintiff in this case, and that it was well adapted for the guidance of the jury. The court charged the jury, in substance, that a motorman operating an electric street car has the right to presume that, upon the approach of the car, due warning being given of such approach, an adult person on the track, or in a position near the track, where he is liable to be struck, will exercise reasonable care for himself, and will remove himself from his position of danger as the car approaches. The plaintiff complains of this, but, we think, without sufficient reason. *Morrissey v. Bridgeport Traction Co.*, 68 Conn. 215-218, 35 Atl. 1126. The plaintiff, in his brief, concedes that such a presumption exists with reference to a person in the street, as distinguished from the sidewalk, but he contends that no such presumption exists with reference to one standing on the sidewalk. This distinction is not tenable, as applied to a case like the present. The plaintiff was in fact in a position of danger, and the motorman, upon the facts in the case, had a right to presume that plaintiff was aware of it, and would govern himself accordingly. He had a right to so presume, as the court told the jury, "until it is apparent, or by the exercise of reasonable diligence would be apparent, to him, that the person is in danger, and is not aware of the danger, or is so situated that he cannot avoid the danger." The jury were properly instructed upon this point.

The plaintiff also complains of that part of the charge hereinbefore quoted in connection with request "a," to the effect that the plaintiff, standing where he did, was bound to use reasonable care. For the reasons heretofore given, we think the court did not err in so charging. The court charged, in substance, that the de-

defendant claimed to have proved certain facts, to wit, that the position of its tracks was authorized by its charter and the laws of this State; that it was running a kind of car commonly in use; that the gong was sounded, and the car came round the curve at a slow rate of speed, at the time of the accident. The plaintiff complains of this because the court did not add a caution "that these claims of the defendant were not sufficient, or probably sufficient, as plaintiff was standing on the sidewalk." The court was not asked to add any such caution, and it clearly did not err in failing to do so in making a statement of the facts which the defendant claimed to have proved. The court, in other parts of its charge, sufficiently called the attention of the jury to the fact that this was a case where the plaintiff was, when injured, standing upon the sidewalk, and not in the street. The court further charged, in substance, that if the car that struck the plaintiff was of the kind in general and ordinary use by other companies engaged in the same business as the defendant, "the mere use thereof as a street car at such curves as the one in question, in a manner in all other respects careful and proper," would not of itself constitute negligence. The plaintiff complains of this, but, we think, without reason.

This brings us to the last reason of appeal relating to the charge, and that is to the effect that the whole charge, as given, is erroneous. This reason is too general, and raises no question that we are bound to consider; but, looking carefully over the charge as a whole, we think the general assignment has no foundation in fact.

The rulings upon evidence will now be considered:

Shepard, a witness for the plaintiff, testified on his direct examination that he saw the accident, and helped to rescue plaintiff from the car as he was being dragged toward the electric-light pole. He was asked later by the plaintiff how much room there was between the handle of the car and the pole, and answered, "About eighteen inches." He was then asked this question: "Can you tell from recollection whether there was room for the body of Mr. Hayden [the plaintiff] between the car and the post? The court, on objection, excluded the question, and we think it ruled correctly. The witness had already, in effect, answered the question; and, besides, it does not appear that the distance

between the car and the pole was a material fact in the case. The plaintiff was not injured by the proximity of the pole to the car.

Comstock, the man with whom the plaintiff was talking when injured by the car, was a witness for the plaintiff, and on his direct examination was asked "whether a motorman on State street could have seen Mr. Hayden [the plaintiff] where he stood? This was objected to as calling for a conclusion, without showing that the witness was in any position to draw a conclusion. The court excluded the question, and properly excluded it, on the ground stated. Besides, the exclusion did the plaintiff no harm, for it was "conclusively proved by the plaintiff, and appeared to be conceded by the defendant, that there was an unobstructed view from where the plaintiff stood up State street, 100 to 200 rods."

The defendant offered in evidence, and the court admitted, an order of the court of common council of New Haven, approved by the mayor December 19, 1898, permitting the defendant to locate its tracks at the point in question, as shown upon four blue prints attached to the order, and relating to the location of the tracks at the time and at the place of the injury. The plaintiff objected to the reception of this evidence, but stated no reasons therefor. The plaintiff claimed that the location of the tracks at the point in question was a negligent location, and he attacked the right of the defendant to maintain it there. The evidence objected to showed that it was the only location that had been given them by the lawful authorities, and that it was, to that extent, at least, a lawful location. The record does not disclose that the court erred in admitting this evidence.

The reasons of appeal founded upon the rulings of the court in case of the witnesses Kelly and Punderford are without merit, and need not be discussed. Indeed, in the Kelly case no exception was taken to the rulings.

This disposes of all the reasons of appeal based upon rulings upon evidence.

There is no error. The other judges concurred.

Foster v. Atlanta Rapid Transit Co.

(Georgia — Supreme Court.)

EVIDENCE AS TO STATEMENTS BY WITNESSES MADE TO EMPLOYEE OF COMPANY NOT ADMISSIBLE.—In an action to recover damages for an alleged unwarranted ejection¹ from a street car it appeared that the defendant's agent employed to investigate accidents took the names of the passengers on board the car when the alleged assault was committed, and testified, over the objection of the plaintiff's counsel, that he had seen these people and they had told him they knew nothing about the occurrence. It was held that such testimony was hearsay and incompetent; that the natural tendency of such evidence being to discredit the plaintiff's witnesses and prejudice his case, the admission of such evidence requires the grant of a new trial.²

ERROR by plaintiff from judgment for defendant. Decided March 4, 1904.
Reported 119 Ga. 675, 46 S. E. 840.

Rucker & Rucker, for plaintiff in error.

Rosser & Brandon and *W. T. Colquitt*, for defendant in error.

Opinion by FISH, P. J.

Frank Foster, by his next friend, Henry Foster, brought suit in the City Court of Atlanta against the Atlanta Rapid Transit Company, a street railroad company, for damages. The petition alleged that Frank Foster, while a passenger on a car of the defendant company, and prepared to pay his fare, was, without warrant or authority of law, pushed and kicked from the same

1. Ejection of passenger, see *Breen v. St. Louis Transit Co.*, 77 S. W. 78; *Gotwald v. St. Louis Transit Co.*, 2 St. Ry. Rep. 632, (Mo. App.) 77 S. W. 125; *Ickenroth v. St. Louis Transit Co.* (Mo. App.), 77 S. W. 162; *Indianapolis St. Ry. Co. v. Hockett*, 1 St. Ry. Rep. 116, (Ind.) 67 N. E. 106; *Garrison v. United Rys. & Elec. Co.*, 1 St. Ry. Rep. 267, 55 Atl. 271; *Huba v. Schenectady Ry. Co.*, 1 St. Ry. Rep. 592, 85 App. Div. (N. Y.) 199, 83 N. Y. Supp. 157. As to admissibility of declarations of street railway employees in an action for the ejection of a passenger see note to *Boone v. Oakland Transit Co.*, 1 St. Ry. Rep. 17.

2. The declarations of a third person who is himself a competent witness are not as a rule admissible in evidence. *Bank of Alabama v. McDade*, 4

by the conductor in charge of the car, whereby he sustained certain specified injuries. The defendant company, by its answer, denied that its conductor committed any of the acts charged in the petition. On the trial of the case there was a sharp conflict in the testimony introduced by the parties. The jury found a verdict for the defendant. The plaintiff made a motion for a new trial on the usual grounds, to which, by amendment, there was added one other. This last ground alleged error in the following ruling of the court: L. O. Simmons, a witness for the defendant, testified that the names of the persons who were on the car that night were turned over to him, and he went to see them. The court then, over the objection of plaintiff's counsel, allowed him to testify as follows: "I did not subpoena them because they did not know anything about it. They said they did not know anything about the transaction, and so I did not need them." The objection made to the admission of this testimony was that it "was incompetent, irrelevant, immaterial, and hearsay." The motion for a new trial alleged that this testimony was hurtful to the plaintiff, because two witnesses for the plaintiff had sworn that the conductor came into the car after he had kicked the plaintiff, Frank Foster, off, and said, "I am going to kill a lot of them little sons of bitches," and "further stated he was going to kill a lot of them damned little niggers, and laughed about it." In a note to this ground the trial judge states: "The court stated to the jury that he let this evidence in to account for the nonproduction of the witnesses, and not for the purpose of proving facts." The record shows that one of the witnesses who swore that the conductor made the statements mentioned above testified that others on the car heard these statements. According to the testimony of the conductor, there were many people on the car at the time it was alleged he kicked and pushed the plaintiff off, espe-

Port. (Ala.) 252; *Wallace v. Spullock*, 32 Ga. 488; *Kendall v. Hall*, 6 Blackf. (Ind.) 507; *Hutchinson v. Watkins*, 17 Iowa, 475; *Jones v. Letcher*, 13 B. Mon. (Ky.) 363; *Bain v. Clark*, 39 Mo. 252; *Truesdale v. Sanderson*, 33 Mo. 532; *Woodward v. Payne*, 15 Johns. (N. Y.) 493; *Alexander v. Mahon*, 11 Johns. (N. Y. 185); *Hummel v. Brown*, 24 Pa. St. 310. A proper foundation having been laid the declarations of a third person who has been called and has testified as a witness are admissible for the purpose of discrediting such witness. See Greenl. Ev. (16th ed.), § 461f.

cially at and near the end of the car where this was said to have occurred; and the circumstances testified to by the plaintiff and his witnesses were of such a character that, if they really occurred, other passengers on the car would very likely have had knowledge of them. Therefore, for the court—no matter what may have been his purpose in admitting this testimony—to allow Simmons, an agent of the defendant company charged with investigating the case and looking for witnesses, to testify that he had received a list of the names of the persons who were on the car when it was alleged this occurrence took place, and had seen these people, and they had told him they knew nothing about it, was to admit hearsay testimony, the natural tendency of which was to discredit the testimony of the plaintiff's witnesses and to injure his case. To allow a witness, presumably of good standing and character, to testify that he had seen the persons who were on the car at the time the plaintiff was alleged to have received his injuries, and they had stated to him that they knew nothing of such an occurrence as the one in question, was, in a measure, equivalent to these persons themselves so stating to the jury. It was to allow statements not made under oath, unsifted by cross-examination, possibly made by the parties to avoid being subpoenaed as witnesses, and prejudicial to the plaintiff, to be submitted to the jury. Who can say what force and effect such hearsay statements may have had upon the minds of jurors, considering a case in which the testimony of the witnesses who really appeared before them was, upon the vital issue in the case, so painfully conflicting? That the evidence was open to the objection that it was hearsay, there can be no doubt. Its admission absolutely required the grant of a new trial. That the court told the jury that it was admitted only for the purpose of accounting for the nonproduction of witnesses does not affect the question of its admissibility. It would open a very wide door for the introduction of hearsay testimony to hold that testimony of this character was admissible for such a purpose. All that a party would have to do to get before the jury unsworn statements of persons shown to have been present when a given transaction was alleged to have occurred, tending to show that it did not occur, would be to introduce a witness who would

swear that he had seen such persons, and they had told him that they knew nothing about such an occurrence. Neither the plaintiff nor the defendant was under any legal obligation to introduce as witnesses all the persons who were on the car at the time of the alleged occurrence, and so neither was required to account for the nonproduction of such persons as witnesses. Besides, if either had been under any obligation to account for the nonproduction of such persons, this was not the way in which to do it. If production were required, nonproduction could not be excused upon such a ground, and hearsay evidence would be none the less inadmissible. The way to account for the nonproduction of a witness is to show inability to produce him. To sustain the ruling of the court, the defendant in error cites *Richmond & Danville R. Co. v. Garner*, 91 Ga. 27, 16 Atl. 110. In reference to this citation, it is sufficient to say that there the absent witness was the plaintiff's wife, and he accounted for her nonproduction by simply showing that she was detained at home by reason of the sickness of her children. The question of the admissibility of hearsay evidence was not involved.

Judgment reversed.

Atlanta Railway & Power Co. v. Owens.

(Georgia — Supreme Court.)

1. **ATTORNEY'S LIEN; ENFORCEMENT OF SUIT.**—While attorneys-at-law have the same right and power over suits brought in behalf of their clients to enforce their lien for fees as their clients have, and such suits may be prosecuted for the benefit of the attorney having a lien notwithstanding a settlement between the parties to the suit, made without the knowledge or consent of the attorney, still there can be no recovery in behalf of the attorney, unless the evidence is of such a character as would have authorized a recovery by the client if the suit were still proceeding for his benefit.
2. **EVIDENCE; NEW TRIAL.**—The evidence being of such a character that a recovery in behalf of the plaintiff would not have been authorized, a finding in favor of the attorneys, who were prosecuting the suit to enforce their lien for fees, was unauthorized, and the court erred in not granting a new trial.

(Syllabus by the court.)

Reversed by defendant from judgment for plaintiff. Decided March 20, 1904.
Reported 119 Ga. 833, 47 S. E. 214.

Rosser & Brandon, Walter T. Colquitt, and B. J. Conyers, for plaintiff in error.

Waites & Howard and Westmoreland Bros., for defendant in error.

Opinion by COBB, J.

The plaintiff sued the street railway company for damages. While the suit was pending, the defendant paid to the plaintiff a sum of money in full satisfaction of her demand, and she signed a paper releasing the company from all liability to her. This settlement was made without the knowledge or consent of her attorneys, and they are prosecuting the suit to enforce their lien for fees. The law authorizes an attorney who has a lien upon the suit to prosecute it for the purpose of enforcing the payment of his fees. Civ. Code 1895, § 2814 (2). When the suit is so prosecuted, there can be no recovery for fees, unless the evidence is of such a character as that a recovery in behalf of the client would have been authorized if the suit were still proceeding for his benefit. The injuries to the plaintiff were the result of a collision between a carriage in which the plaintiff was being driven and one of the cars of the defendant company. The collision occurred on the 2d day of September, 1901, about 7 o'clock in the evening, and at a point not at a street crossing. The circumstances under which the collision occurred are best told in the language of the plaintiff herself, in the following extracts from her testimony:

"I was coming back along Grant street. The city lights had been lighted. I was coming in from Grant Park down Grant street, and before I got to Glenn street I saw a large covered wagon ahead of me, so I could not pass. Of course I had to turn, and I just drove diagonally across the track, and after I got on the track I saw the car was coming so close, and I whipped my horse up, and before I got off the car struck me." "The character of that covered wagon, as to obstructing my view up the street in front of me, was such that I could see the light of the car, but could not see the car itself. I saw the light of the car before I drove upon the track. I knew the car was coming and saw the light." "I saw the light of the car coming down there,

and heard the car before I turned on the track. Before I turned on the track I saw the light of the car, and heard it too. I saw the light of the car, and heard it, before I turned onto the tracks. I didn't know how close it was on me until I drove on the track. I knew the car was coming, however. I heard the car coming, and saw the light of the car itself. The car was lit up. It had a headlight on it. After I drove on the track, everything happened so quickly I don't remember much what happened." "When I first knew the car was coming I was between Glenn and Georgia avenue. The car was beyond Glenn street. What called my attention to it was I saw the reflection of the light. I didn't see the car until I drove upon the track — not until I drove on the track. I did see it then. I didn't see it until I drove on the track. I didn't look for it before I drove on the track. I couldn't see it at all, if I had. The wagon obstructed the view. After I got on the track, the wagon was not in my way. I drove diagonally across from behind the wagon. I didn't see the car until I got on the track. I heard the car, and I saw the reflection of the car. I attempted to cross the track, because I thought I had time to get across. The car, when I first saw it after I got on the track, was beyond Glenn street. I was at the corner of Glenn almost, I couldn't tell exactly. I couldn't tell you how far from the crossing I was. I was right at Mrs. Burns' house; that is all I can say. It was not fifty feet, though." "Q. You say when you first saw this car it was beyond Glenn street? A. Yes, sir. Q. Have you any idea, when you first drove up there, how far the car was from you? A. No, sir; it was right on me. It ran up on me before I could get across. Q. When you went to drive across, have you any idea how far it was from you? A. The only thing I know is it was beyond Glenn street." "Q. You say you heard this car coming? A. Yes, sir. Q. Did you see the car? A. I saw the reflection of the light up the car track."

An ordinance of the city prohibited the company from running its cars at the place where the collision occurred at a greater rate of speed than fifteen miles per hour, and there was evidence from which the jury could find that the car was being run at a greater rate of speed than the ordinance authorized. In other words, there was evidence authorizing the jury to find that the company was negligent. The question to be determined, therefore, is whether the plaintiff, notwithstanding the defendant's negligence, has been guilty of such negligence as to preclude a recovery. In determining this question we must look to her testimony. If a person testify in his own behalf, and there are material conflicts and contradictions in his testimony, he is not entitled to recover if he be the plaintiff, unless that portion of his testimony which is least favorable to his contention is of such a character as to

authorize a recovery in his behalf. The rule just referred to was first laid down in the case of *Western & Atlantic R. Co. v. Evans*, 96 Ga. 481, 23 S. E. 494. It was recognized and approved in *Freyermuth v. Railroad Co.*, 107 Ga. 32, 32 S. E. 668, and *Southern Bank v. Goette*, 108 Ga. 796 (2), 33 S. E. 974. Applying this rule to the plaintiff's testimony, the case presented shows that at the time she drove upon the track she knew the car was approaching, both from the noise and the light, though her view of the track was obstructed by the wagon. Under such circumstances, any prudent person would have taken some precaution to ascertain how near the car was from the point where the attempt to cross was to be made, and to attempt to cross under the circumstances indicated by the plaintiff's testimony, where she had full knowledge that the car was approaching, and did not know how near or how far it was, or at what rate of speed it was running, was such an act of negligence on her part as would preclude a recovery by her. She should at least have taken the precaution to ascertain how near the car was before attempting to cross the track, when she was on notice, both by the noise and the light of the car, that it was approaching. This seems to be a case where the plaintiff, knowing the danger, deliberately took the risk of being able to cross before the car could reach the point where she intended to cross, and made an error of judgment as to the time that would elapse before the crossing could be made or before the car could reach that point. Such an attempt, under such circumstances, was an act of gross negligence on her part, and evidenced such a lack of prudence as to entirely defeat a recovery by her. In her testimony she says, "I attempted to cross the track because I thought I had time to get across." And in another part of her testimony she says that she did not see the car until she drove upon the track. This case is very much like that of *Southern Ry. Co. v. Blake*, 101 Ga. 217, 29 S. E. 288, and is to be distinguished from the case of *Western & Atlantic R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802, by reason of the fact that in the latter case the plaintiff took the precaution to look down the track before attempting to cross, and at the time he looked the train was not in sight, nor

could it have reached the point where he desired to cross before he had time to cross if it had been run at a lawful rate of speed.

The plaintiff having, in our opinion, failed to take such precautions for her safety as, under the circumstances, an ordinarily prudent person would have taken, she would not be entitled to recover, notwithstanding the car may have been run at an unlawful rate of speed at the time of the collision. As the plaintiff would not have been entitled to recover for her own benefit, the attorneys had nothing upon which their lien could operate, and the court erred in not setting aside the verdict in favor of their lien.

Judgment reversed.

North Chicago Street Railway Co. v. Johnson.

(Illinois — Supreme Court.)

INSTRUCTION AS TO DUTY OF EMPLOYEES TO AVOID INJURIES TO PERSONS ON THE STREETS.¹—The plaintiff's intestate, a boy of four years of age, while crossing the tracks of the defendant was struck and killed by one of its cars. An instruction to the effect that it is the duty of the company's servants in operating its cars upon the public streets "to be on the lookout and to take reasonable measures to avoid injuries to persons on the streets" is not objectionable. Such instruction is based upon the duty of the company to recognize the fact that persons have a right to the lawful use of the street, and to run its cars in such manner as, in the exercise of reasonable care, to avoid injury to them.

APPEAL by defendant from judgment for plaintiff. Decided October 26, 1903.
Reported 205 Ill. 32, 68 N. E. 463.

John A. Rose and Louis Boisot (W. W. Gurley, of counsel),
for appellant.

John F. Waters, for appellee.

Opinion by WILKIN, J.

Appellee, in an action against appellant in the Superior Court of Cook county, recovered a judgment for causing the death of

1. As to the liability for failure of motorman to exercise proper care in avoiding collision see *Harrington v. Los Angeles Ry. Co.*, 2 St. Ry. Rep. 22, and the cases reported in this series cited in a note to that case.

his intestate. The deceased was a boy four years old, and while crossing the track of appellant at the crossing of Center and Sedgwick streets and Lincoln avenue, in the city of Chicago, on the 23d day of October, 1894, was struck and killed by one of appellant's cars. There have been three trials of the case, each of which resulted in a verdict for plaintiff, the first being set aside by the trial court and the second reversed upon appeal to the appellate court. The third trial resulted in a verdict for \$3,500, upon which, after a remittitur of \$750, judgment was rendered for \$2,750. From a judgment of affirmance rendered by the appellate court, appellant prosecutes this further appeal.

The sole ground of reversal here urged is that the trial court erred in its instructions to the jury. The second and fourth instructions given to the jury at the request of the plaintiff are objected to. The second is to the effect that it is the duty of the company's servants, in operating its cars upon the public streets, "to be on the lookout and to take reasonable measures to avoid injuries to persons on the streets." It is in conformity with the law as announced by this court in *Chicago City Ry. Co. v. Jennings*, 157 Ill. 274, 41 N. E. 629, and *North Chicago Electric Ry. Co. v. Peuser*, 190 Ill. 67, 60 N. E. 78. The instruction is not calculated to give the jury to understand that the right of the deceased in the street was superior to that of the street car company, as contended by counsel for the appellant, nor did it require the gripman who was in control of the car to look in any particular direction, as is assumed in the argument. It imposed upon the company the duty of recognizing the fact that persons had a right to the lawful use of the street, and in running its cars to take reasonable care to discover such persons and avoid injury to them. There was no error in giving the second instruction. The fourth relates to the damages, and is almost a literal copy of an instruction approved by this court, adopting the opinion of the appellate court, in *Baltimore & Ohio Southwestern Ry. Co. v. Then*, 159 Ill. 535, 42 N. E. 971. It was properly given.

The judgment of the appellate court will be affirmed. Judgment affirmed.

Chicago Union Traction Co. v. Fortier.

(Illinois — Supreme Court.)

1. **INSTRUCTION AS TO PHYSICAL AILMENT RESULTING FROM INJURY.**—An instruction to the effect that whether or not an ailment complained of by the plaintiff is the result of the accident causing the personal injuries for which the suit is brought, must be determined by the jury from the evidence, and that such questions are solely and exclusively for the jury and they must determine them from the evidence, and from that alone, is not erroneous.
2. **EXPERT TESTIMONY AS TO WHETHER PLAINTIFF WAS FEIGNING.**—Where experts called by the plaintiff were questioned upon cross-examination for the purpose of establishing the theory that the plaintiff was feigning to a large extent the injury complained of, it is competent upon redirect examination for the plaintiff to ask such witnesses as experts whether from their knowledge of the case and from tests and observations made by them while examining the plaintiff, it was their opinion that the plaintiff was feigning such injuries.

APPEAL by defendant from judgment of the Appellate Court, affirming a judgment for the plaintiff. Decided October 26, 1903. Reported 205 Ill. 305, 68 N. E. 948.

John A. Rose and *Louis Boisot* (*W. W. Gurley*, of counsel), for appellant.

Gemmill & Foell, for appellee.

Opinion by **RICKS, J.**

This is an action on the case, commenced in the Superior Court of Cook county, to recover damages for injuries sustained by appellee while a passenger on a street car operated by appellant. A judgment for \$10,000 was rendered in the trial court, which, upon appeal to the Appellate Court for the First District, was affirmed, and this further appeal is prosecuted by appellant.

The only errors assigned and discussed are the refusing of the first and second instructions offered by appellant, the modification by the court of appellant's third instruction, and also the admission of certain evidence offered by appellee, which is hereinafter referred to.

The first instruction is fully covered by the third instruction as modified by the court. The second instruction was covered, in all its essential features, by the sixteenth, seventeenth, eighteenth, and twenty-third instructions given by the court at the request of appellant. The third instruction was modified by the court by expunging the parts printed in italics and by adding the parts between brackets. It was as follows: "(3) The jury are instructed that with respect to the ailments and disabilities claimed for the plaintiff in this case the burden of proof is upon the plaintiff in that respect, as it is with respect to the question of liability, to show, by a preponderance of the evidence, not only that such ailments really exist or have existed, but also that such ailments and disabilities are the result of the action in question; and the burden of proof is not upon the defendant to show that such alleged ailments do not proceed or arise from any other cause. The jury are further instructed that they have no right to guess or conjecture that any ailment complained of by the plaintiff is the result of this accident. [Whether it is or not must be determined by the jury from the evidence.] The jury are not to understand from this [or any other] instruction that the court intends to intimate *that the plaintiff has such disabilities as is claimed, or that the defendant is or is not in any manner liable, or to intimate any opinion upon that or any other question of fact in this case.* [All such questions and matters are solely and exclusively for the jury, and they must determine them from the evidence, and from that alone.]" We are unable to see any error in thus modifying this instruction.

It is also assigned as error that the trial court improperly permitted two expert witnesses produced by appellee to give, on redirect examination, their opinions as to whether the plaintiff was feigning. Two objections are made to this evidence: First, because it was directed to a mental process, about which the witnesses could not know; and, second, because it was usurping the province of the jury by asking the witnesses to give their opinions upon the very question which the jury were impaneled to decide. It appears from the evidence that on flexing appellee's right leg there was a sudden jump at the hip joint, which assumed somewhat the characteristics of a dislocation at the hip joint, but which

apparent dislocation proved to be fallacious; that a close examination disclosed, not a true dislocation of the joint, but rather a dislocation of the large muscle which covers the outside of the thigh bone. This apparent dislocation of the joint took place when appellee moved her leg in the motion she would naturally go through in making an attempt to walk, and was of such a serious nature that it prevented her from walking except with the aid of crutches. This sudden jump was by these experts attributed to an overstretching of the covering of this large muscle, or to the actual tearing of that covering, together with a probable overstretching of the ligaments of the hip joint, and perhaps a tear in one of those ligaments. One of the experts called by the appellee on cross-examination stated that he had never seen a case like this one, and had never read of one, and distinguished the case of appellee, who was suffering from a dislocation of the muscle, from the so-called "voluntary dislocations of the hip joint," which latter dislocation appears to be mentioned in a number of text-books on surgery. Upon cross-examination of these witnesses by counsel for appellant it plainly appeared that appellant rested its defense upon the theory that the plaintiff was feigning to a large extent the injury complained of, and on such examination a number of questions were asked them seeking to establish this theory. Upon redirect examination, counsel for appellee then asked such witnesses as experts, and based upon their knowledge of the case and tests and observations made while examining appellee, whether or not the action of the muscle was voluntary or involuntary on the part of appellee, to which they replied that in their opinion such movement was involuntary, and not feigned. As we understand the record, these opinions were not based on the mental process of the appellee, but were founded upon their opinions as expert surgeons and examinations made on the person of the appellee. From the testimony of these experts it appears that from their examinations they were able to state with more or less certainty whether or not it was possible for the appellee to simulate this condition, and it is plainly apparent that on this matter, and from the conditions described, one who was not an expert could not form an intelligent opinion, and there was, therefore, no error in admitting this

testimony. *Chicago, Burlington & Quincy R. Co. v. Martin*, 112 Ill. 16.

As no other errors are raised on this record, the judgment of the Appellate Court will, therefore, be affirmed. Judgment affirmed.

Farson v. Fogg.

(Illinois — Supreme Court.)

AGREEMENT WITH STREET RAILWAY COMPANY TO PAVE STREETS; ULTRA VIRES; SPECIFIC PERFORMANCE.—Under Illinois Rev. Stat., chap. 24, § 63, city councils are vested with the exclusive power to pave, grade, curb, improve, and regulate the streets. A street railway company has no power to enter into an agreement with the owners of property abutting on streets to pave the streets through which its tracks are laid. Such a contract is *ultra vires*, and cannot be specifically enforced.

APPEAL by defendants from judgment affirming a decree for the complainants. Decided October 26, 1903. Reported 205 Ill. 326, 68 N. E. 755.

Statement of facts by MAGRUDER, J.

This is a bill filed in the Circuit Court of Cook county on July 21, 1897, against the Calumet Electric Street Railway Company, John Farson, Arthur B. Leach, Levi H. Fuller, John C. McKeon, and Idea L. Hammond, administratrix of William A. Hammond, deceased, for the purpose of enforcing the specific performance of the following agreement, to wit:

"This memorandum of agreement, made and entered into by the undersigned this 17th day of September, A. D. 1895, witnesseth:

"That whereas, the Calumet Electric Street Railway, a corporation, has made application for a franchise or a license to build a one or two-track electric railway on Cheltenham Place from the easterly line of Bond avenue to a point four hundred and eighty feet easterly therefrom, in Chicago, Illinois; and whereas, the said corporation has agreed with the undersigned, Simon F. Fogg and William C. Kinney, who are the owners of lots 172, 173, 174 and 175 in Westfall's subdivision, etc., * * * and the eighty feet in width east of and adjoining said lots 172 and 174, to cut, grade, curb, macadam and build the cross-walks in said Cheltenham Place from curb to curb from said Bond avenue to said point, the work to be of uniform width throughout, according to the specifications hereto attached and hereby made a part hereof, in consideration for, and in full payment of, the damages which said Fogg and Kinney will incur in connection with, and by reason of, the construction of said railway on said Cheltenham Place, if the said corporation shall secure said ordinance; and whereas,

the undersigned, Farson, Leach & Co., being interested in said corporation and in the securing of said franchise and the construction of said road, to secure the faithful performance of said agreement by said corporation on or before September 1, 1896, if it shall secure said franchise in the meantime, have placed their certified check for \$1,000.00, drawn upon the National Bank of Illinois, and made payable to William A. Hammond, vice-president, as trustee, to secure the faithful performance of said agreement;

"Now therefore, in consideration of the premises, it is mutually agreed between the undersigned that, if said corporation shall complete said cutting, grading, curbing, macadamizing and cross-walks according to the specifications hereto attached as aforesaid, on or before September 1, 1896, the said William A. Hammond shall, when said work is fully completed according to said specifications, return said check to said Farson, Leach & Co. If said corporation shall not secure the said franchise or license and shall have withdrawn its application therefor, and returned to said Fogg and Kinney their petition to the city council to grant said franchise or license to said corporation, then said check shall be returned to said Farson, Leach & Co. If said corporation has acquired on or before September 1, 1896, said franchise or license, and neither it, nor the said Farson, Leach & Co. has completed said work according to said specifications, said check shall thereupon be endorsed by said Hammond, or his successor as vice-president of said bank, and delivered to said Fogg and Kinney by said Hammond or his successor, and said bank shall pay the same to said Fogg and Kinney upon said endorsement when made by said Hammond or his said successor, and said Fogg and Kinney shall have and hold said sum of \$1,000.00 as and for liquidated damages for the failure of said corporation or said Farson, Leach & Co. to do said work. The said work shall be done in accordance with said specifications to the satisfaction of said Fogg and Kinney. In case said company be restrained by any court from proceeding as above specified, then the time to complete said work shall be correspondingly extended, but not in all longer than ninety days from September 1, 1896.

"This agreement shall be binding upon the heirs, representatives and assigns of the undersigned.

"In witness whereof, the undersigned have hereunto set their hands and seals the day and year first above written.

"SIMON F. FOGG, [Seal.]

"WILLIAM C. KINNEY, [Seal.]

"Per SIMON F. FOGG. [Seal.]

"The Calumet Electric Street Railway Company for value received hereby acknowledge that it has agreed to do said work according to said specifications, as in the foregoing memorandum is stated, and upon the conditions therein recited.

"Calumet Electric Street Railway Co.

"JOHN FARSON, Gen. Manager."

The specifications, attached to the contract, provide that, whenever cutting occurs, the earth must be excavated to such depth as the engineer may direct, and the surface graded to stakes to be given by him; that, before paving, the street should be graded to conform to stakes or profiles to be given by the engineer in charge, and thoroughly flooded, rammed, and rolled, to give it a solid bed; that on the roadbed thus formed and completed will be spread a layer of clean, broken stone entirely free from dust and dirt, not less than — in depth in the center, and not less than — at the sides after being thoroughly rolled; that the stones shall be practically uniform in quality, etc.; that on the above layer shall be spread limestone screenings or bank gravel, as designated by the commissioner of public works, in sufficient quantities to fill up all interstices, and then flooded and rolled, etc.; that the above to be covered with medium limestone, etc.; the interstices to be filled with limestone screenings, or bank gravel, and flooded; that this layer shall not be less than — in depth at the sides and not less than — at the center, after being thoroughly rolled; that the cubes shall be of best quality of oak plank, three inches in thickness by fourteen inches in width, etc.; that there shall be four crosswalks at each street intersection, three at each half intersection, and one at each and every alley, to be constructed of Ottawa or Grape Creek paving brick, or brick of equal quality and shape; that the brick shall be equal in quality to standard samples in the office of the commissioner of public works, the crosswalks to be formed under the direction of the engineer in charge of the street, and to be six feet in width; that the brick must be laid in uniform courses, etc.; that when laid the pavement shall immediately be covered with clean, dry, sharp sand in proper quantities, and swept until all joints become filled therewith, etc.; that no broken or cracked brick will be allowed to remain in crosswalks; that all crosswalks and their appurtenances shall be constructed by the contractor without any extra charge for the same over and above the price bid per lineal foot for macadam.

A joint and several answer was filed to the bill by the Calumet Electric Street Railway Company, John Farson, A. B. Leach, Levi H. Fuller, and John C. McKeon. The answer sets up that the National Bank of Illinois was in the hands of a receiver, and that John McNulta was such receiver. Accordingly, on May 7, 1898, the appellees, complainants below, filed a supplemental bill making John McNulta, receiver of the National Bank of Illinois, a party defendant. John McNulta, receiver of the National Bank of Illinois, filed an answer.

It also appeared from the answers that the Calumet Electric Street Railway Company was in the hands of a receiver, but such receiver was not made a party to either the original or supplemental bill.

The cause, after being at issue, was referred to a master in chancery, who made findings substantially in accordance with the prayer of the bill. The master's report, after objections and exceptions thereto, was confirmed by the court, and the final decree entered on March 22, 1901. An appeal was taken

from this decree to the Appellate Court, and the decree of the Circuit Court was affirmed. The present appeal is prosecuted from such judgment of affirmance.

The material facts, as gathered from the pleadings and proofs, and from the master's report, and the decree of the court, are substantially as follows: The premises in question were owned by appellees, Fogg and Kinney, but the legal title was in Fogg, Kinney owning the equitable title to an undivided half of the premises. The premises owned by appellees were on the south side of Cheltenham place, and fronted toward the north thereon 480 feet. That is to say, the whole frontage of the block on the south side of Cheltenham place between Bond avenue and Lake avenue was the property of appellees. The Calumet Electric Street Railway Company (hereafter called the Calumet) had applied to the common council of the city of Chicago for a license or ordinance to lay tracks on Cheltenham place in front of the property of appellees. The evidence tends to show that the South Chicago City Railway Company (hereafter called the South Chicago) was also seeking a right of way on Cheltenham place between Bond and Lake avenues, which was one block. No franchise could be obtained from the city to construct and operate a railway on said street without the consent of the appellees. Farson and Leach were copartners under the name of Farson, Leach & Co., and interested in the Calumet. About September 18, 1895, Fogg, representing the appellees, and Leach, representing the corporation, and Farson, Leach & Co., placed a duplicate of said agreement and a check or order for \$1,000 in the hands of said Hammond in said national bank in trust, and told Hammond that the check was delivered to him in trust for the carrying out of the said agreement between the parties, and Hammond received the papers in trust for such purpose. The bill alleges that the check for \$1,000 was signed by Levi H. Fuller, by the name of L. H. Fuller, and addressed to Farson, Leach & Co., dated September 18, 1895, requesting Farson, Leach & Co. to pay to the order of W. A. Hammond \$1,000, and duly certified and accepted by Farson, Leach & Co. The check thus described in the bill differs from the check described in the agreement. The bill alleges that the Calumet secured the ordinance for laying down its tracks on September 1, 1896, and was not restrained from doing so by any court. Appellees, on December 11, 1896, notified Hammond that the paving had not been done, and requested him to indorse and deliver the certified check to them, the appellees. On December 21, 1896, the National Bank of Illinois became insolvent, and one John C. McKeon was appointed receiver under the laws of the United States, and as such receiver was succeeded by John McNulta. On December 31, 1896, appellees again notified Hammond in writing that the work had not been done, and claimed the check, and requested him to indorse and deliver it to them. Hammond stated that he had delivered the check to the bank. The National Bank of Illinois had no interest in the check, and the proof shows that it was in the hands of one Frost, who acted as clerk for McNulta, the receiver. Ham-

mond died on January 2, 1897. The check was produced upon the trial from the hands of Frost. Neither Farson, Leach & Co. nor the Calumet Railway Company have done anything toward the paving of said street or the payment of the \$1,000. The Calumet Company has placed wires and tracks in Cheltenham place, and is operating electric cars thereon.

The bill alleges that appellees claimed that they would incur damages to their property by reason of the construction of the railway on Cheltenham place, and that the street was to be paved, or the \$1,000 to be paid in consideration for and in full discharge of said damages.

The answers deny that the contract was executed for the purpose of compensating appellees for the damages expected to be incurred to their property. The answers charge that the appellees combined with the South Chicago Company and with others to extort money from the Calumet Company, and prevent the latter from obtaining from the common council of the city an ordinance for building and operating an electric railway in Cheltenham place; that appellees claimed that the South Chicago Company had offered them pecuniary inducements not to sign for the frontage of the property owned by them in favor of the Calumet Company, but to give to the South Chicago Company their signature of frontage to a petition to the city of Chicago for the right to build a railway on Cheltenham place; that appellees declared that, unless the Calumet Company would do better by them than the South Chicago Company, appellees would not sign their frontage to a petition for the Calumet Company; that thereupon appellees presented to the officers of the Calumet Company a draft of the contract, substantially such as that which is set out in the bill of complaint, stating that the terms of said contract were the only terms on which they would sign a petition, for the frontage which they claimed to own on Cheltenham place, in favor of the Calumet Company for an ordinance granting them the right to lay tracks and operate a railway thereon; that they stated that they insisted upon the contract in that form, because it was illegal, and contrary to public policy, and against good morals, for them to contract for a sale of their signatures and consents to the frontage of the property which they claimed to own; that the officers of the company declined to sign said contract, but that Farson, its general manager, made the indorsement thereon as above set forth. The answer charges that the consideration for the signing of the contract by the company was the signing by appellees of the petition addressed to the city council to give the Calumet Company the right to lay its tracks on Cheltenham place in front of the property of appellees. The answers charged that the firm of Farson, Leach & Co. are not made parties defendant to the bill, and that the receiver is not made a party.

The answer admits that the Calumet Company has received its right to the use of Cheltenham place for its electric road from the city of Chicago under an ordinance passed by the common council. The answer denies that there is any need of a pavement upon Cheltenham place, which is near the lake, and full of sand, and called in the answer a street *de soco*.

The answer also sets up that the engineer mentioned in the specifications never gave or furnished to appellants, or the Calumet Company, any grade stakes or profiles as therein specified, and that the engineer of public works never had any samples of brick in his office, and never gave any directions for the laying of the crosswalks as stated in the specifications, and that, therefore, appellants were never able to comply with the conditions of the contract; that the layer of clean, broken stone was not specified to be of any particular depth, either in the center or at the sides, and that the contract was so indefinite and uncertain in its terms that it was impossible for appellants to carry the same out, so that a specific performance thereof could not be decreed by the court.

The answer also sets up that the contract is contrary to public policy, in that by its terms the appellees assume jurisdiction over the public domain, and to take from the city of Chicago, having jurisdiction over the street in question, the power of controlling and maintaining the thoroughfare called Cheltenham place; that the contract is in violation of the city ordinance, which provides that no individual or corporation shall, without the consent of the city, improve in any way or change the condition of its public thoroughfares; and that there never has been any ordinance or license passed by the city, to the appellees or any other persons, to make the improvement contemplated by the contract, and that, therefore, the contract is void; that, when it was made, the appellees well knew that there was no ordinance authorizing the paving of Cheltenham place in the manner therein specified, and that, until such ordinance was passed by the city, the improvement could not be made. The answer also charges that the appellant cannot compel the specific performance of the contract, and that there is no ordinance by which it can be lawfully carried out, and that to carry out the same would be a violation of law and a breach of the peace.

The final decree rendered by the lower court found that the contract had not been performed by the Calumet Company, but that they had failed and refused to perform it, and that appellees were entitled to have from Farson and Leach \$1,000, with interest at the rate of 5 per cent. per annum from September 1, 1896, amounting to \$1,227; that the check or draft for \$1,000 was intended to be held in escrow by Hammond, to be delivered to appellees in case they became entitled to have the same from Farson, Leach & Co.; that Hammond died before this bill was filed, and that appellees had never received the draft, although they had demanded it from Hammond in his lifetime, and after his death from the person into whose hands it came. The decree holds that, upon payment by Farson and Leach of the \$1,000 to appellees, the check should be canceled and vacated, and Farson, Leach & Co. entitled to receive possession of it. The decree then orders that Farson and Leach pay appellees within five days \$1,227, with interest from the date of the decree, and that Farson, Leach, and the Calumet Company pay the costs of the suit, etc.

Judson F. Going (*Daniel V. Gallery*, of counsel), for appellants.

Alexander S. Bradley, for appellees.

Opinion by MAGRUDER, J.

The appellees claim that the contract of September 17, 1895, here in controversy, was executed for the purpose of compensating them for the damages which they expected that their land fronting on Cheltenham place would suffer from the laying down of the tracks of the Calumet Electric Street Railway Company upon said place. The testimony introduced by appellees tends to sustain this contention, and the contract itself recites that the Calumet Company agreed to pave the street in payment of the damages which appellees would incur, by reason of the construction of the railway, upon the street in front of their property, in case the company should secure an ordinance permitting them to lay down their tracks there. On the contrary, the appellants claim that the real consideration of the contract was the signing by appellees of the petition of the Calumet Company to the common council for permission to lay down the tracks. In other words, the appellants contend that they were to pay \$1,000 to appellees for signing their consent to have the tracks laid in the street, and that the written contract, specifying that the consideration was the damage expected to arise, was so expressed for the purpose of covering up the fact that appellees were selling their consent. The testimony of the appellants strongly tends to sustain this contention. There is much upon the face of the contract itself to suggest the theory contended for by the appellants. The contract states that application had been made by the Calumet Company to the city for a license to build a track on Cheltenham place. Both parties must have known, and did know, that under the law the city council had no power to grant the right to the Calumet Company to lay the tracks down in Cheltenham place, except upon the petition of the owners of the land, representing more than one-half of the frontage of the street, or so much thereof as was sought to be used for railroad purposes. The appellees owned all the frontage, amounting to 480 feet, on the south side

of the street. As we understand the evidence, the part of the street where the tracks were to be laid was only the length of one block, so that half of the frontage was owned by the appellees. The contract provides that, "if said corporation shall not secure the said franchise or license, and shall have withdrawn its application therefor, and returned to said Fogg and Kinney their petition to the city council to grant said franchise or license to said corporation, then said check shall be returned to said Farson, Leach & Co." It thus appears that Fogg and Kinney did give to the Calumet Company, or to Farson and Leach for it, their consent to the laying of the tracks.

But while there are many circumstances disclosed by the evidence, and much that appears upon the face of the contract itself, tending to create the suspicion that the parties were trying to avoid the effect of the decision of this court in the case of *Doane v. Chicago City Ry. Co.*, 160 Ill. 22, 45 N. E. 507, 35 L. R. A. 588, yet we are not prepared to say that the evidence is clear and convincing as to the contention of either party upon this question. We, therefore, pass no opinion upon it.

There is another ground, however, pleaded in the answers and pressed upon our attention in the argument filed in behalf of appellants, upon which, in our opinion, the relief prayed for in the bill in this case ought to have been denied.

The Calumet Electric Street Railway Company agreed with the appellees to pave Cheltenham place, a public street in the city of Chicago, for some consideration, which was supposed to operate for the benefit of appellees. The Calumet Company is shown by the proofs to be in the hands of a receiver, and that receiver is not a party to the suit. Waiving, however, the question whether it was necessary to make the receiver a party or not, we are of the opinion that the Calumet Electric Street Railway Company had no power to make any such agreement. Nor has a court of chancery the power to decree the specific performance of any such agreement. It is a well-settled doctrine in this State that a city holds the title to its streets in trust for the public, and cannot turn over such streets to private parties to be improved. The power to control and improve the streets in the city of Chicago is vested in the city itself, or in its common council.

The seventh paragraph of section 63 of article 5 of the city and village act, which was in force in 1895, when the contract here under consideration was made, provides that

"The city council in cities, and the president and board of trustees in villages, shall have the following powers: * * * Seventh—To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds, and vacate the same."

By the ninth paragraph of the same section, the city council has power to regulate the use of the streets, by the sixteenth paragraph of the same section to provide for and regulate crosswalks, curbs, and gutters, and, by the twenty-fifth paragraph of the same section, to provide for and change the location, grade, and crossings of any railroad. 1 Starr & C. Annot. Stat. 1896 (2d ed.), pp. 689, 692, 694, 696, 697, chap. 24, par. 63. The power thus conferred upon the city council to pave, grade, curb, improve, and regulate the streets and crosswalks is vested exclusively in the city council, and cannot be shared by it with any other body or person. It is obvious, from the various provisions above referred to of the city and village act, that the control of the streets and the power to improve them, which are placed in the hands of the city council, are left to a large extent to the discretion of that body. The exercise of these powers is so far discretionary that the mode of their exercise depends upon the will of the city council. *Town of Ottawa v. Walker*, 21 Ill. 605, 71 Am. Dec. 121; *Murphy v. City of Peoria*, 119 Ill. 509, 9 N. E. 895; *Gridley v. City of Bloomington*, 88 Ill. 554, 30 Am. St. 566; *City of Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640.

"In a bill for specific performance the contract must be of such a character that the court is able to make an efficient decree and enforce it when made." 3 Pomeroy's Eq. Jur., § 1405; *Sellers v. Greer*, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589.

It is difficult to see how a court of equity could enforce the contract involved in the case at bar. If it should require the Calumet Electric Street Railway Company to pave Cheltenham place, it would require it to take possession of a public street which belongs to the city and is held in trust by the city for the use of the people. To order the Calumet Company to take pos-

session of this street would be to order it to create an obstruction in a public street, and clothe an outside corporation with the power which the law vests in the municipality. It is well settled that the specific performance of a contract will not be decreed as a matter of course, even though a legal contract is shown to exist. But such specific performance rests entirely in the discretion of the court upon a view of all the circumstances. *Chicago & Alton R. Co. v. Shoeneman*, 90 Ill. 258. In *Gray v. Chicago, Milwaukee & St. Paul Ry. Co.*, 189 Ill. 400, 59 N. E. 950, it was said: "The specific enforcement of a contract is not a matter of absolute right, but of sound discretion in the court."

It is true that the common council, in granting leave to a street railway company to lay its tracks in the street, sometimes imposes, as a condition, that the street railway company shall keep the street between its tracks paved, and perhaps the common council might make it a condition that the street railway company should keep more of the street than lies between its tracks paved and in repair. But a street railway company has no power, by virtue of its own charter, to pave the streets of the city outside and independently of the consent of the city itself. There is no provision in the present contract that the company was to procure or obtain an ordinance from the city permitting it to pave the street. On the contrary, the contract provides as follows: "The said work shall be done in accordance with said specifications to the satisfaction of said Fogg and Kinney." The paving was not to be done, under the provisions of the contract, to the satisfaction of the city or its officers, but it was to be done to the satisfaction of these appellees, private parties having no control over the street itself. Even if the contract was a valid one, the specifications, as charged in the answer, are indefinite and uncertain in many of their provisions. The engineer who, by the terms of the specifications, is to give directions as to the paving, is not necessarily the city engineer, nor does it appear whether he is to be an engineer employed by the Calumet Company or by the appellees.

An offer was made, upon the hearing of the cause below, to produce in evidence the charter of the Calumet Electric Street Railway Company for the purpose of showing that it had no power, by the terms of its charter, to engage in the paving of

public streets. The charter might well have been admitted, but, independently of any provisions of the charter, it must be true that a street railway corporation organized under the laws of Illinois, as the Calumet Company, is shown to be, has no power from the very nature of its organization to engage in the business of paving streets. This contract, therefore, was *ultra vires* the Calumet Electric Street Railway Company. In *National Home Building Assn. v. Home Savings Bank*, 181 Ill. 35, 54 N. E. 619, 72 Am. St. Rep. 245, it was said:

"A contract of a corporation which is *ultra vires* in the proper sense—that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature—is not voidable only, but wholly void and of no legal effect."

It was held, in the case last cited, that the rule that a corporation is estopped to make the defense of *ultra vires* where it has received the benefit of the contract applies only to cases where the contract is within its power but there has been a failure to comply with some regulation or there has been an improper exercise of the power. It was there said:

"If there is no power to make the contract, there can be no power to ratify it, and it would seem clear that the opposite party could not take away the incapacity and give the contract vitality by doing something under it. It would be contradictory to say that a contract is void for an absolute want of power to make it, and yet it may become legal and valid as a contract by way of estoppel through some other act of the party under such incapacity, or some act of the other party chargeable by law with notice of the want of power." See also *Best Brewing Co. v. Klassen*, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26.

Where a contract is thus void, a court of equity will not enforce a specific performance of it.

A notable illustration of this principle may be found in the case of *Sellers v. Greer*, *supra*, where the contract under consideration by the court was a contract by stockholders to sell or dispose of the corporate property without authority or ratification by the corporation, and such contract was held to have no binding effect; and the court there refused to sanction a decree granting a specific performance of it.

In *Hurlbut v. Kantzler*, 112 Ill. 482, a bill was filed for specific performance against Kantzler, Crilly & Blair, and also

the board of education, to compel the assignment of a lease. There, Kantzler held a lease from the board of education, which was not assignable without the written consent of the board. Kantzler, however, gave to Hurlbut a written agreement to assign the lease, but it was held the agreement could not be enforced against the board, as it had not assented to the agreement. In disposing of the case it is there said (page 488):

"There is no allegation in the bill, or proof, that the consent of the board of education will be given, or ever was given. * * * Hurlbut, at the time he took the contract from Kantzler, knew that the latter could not transfer his leasehold interest without the express consent of a third party, against whom he could claim no rights, legal or equitable, and consequently took his contract under such circumstances as to make its validity and effectiveness depend upon the exercise of the will of another under no obligation to do any act for him or for his benefit."

So, in the case at bar, appellees knew, at the time the present contract was executed, that the Calumet Electric Street Railway Company could not pave the street without the consent of the city, even if they could do it with such consent. The appellees took their contract from the Calumet Company, knowing that its validity depended upon the exercise of the will of the city, a third party. The city of Chicago is not a party to the present bill, and a contract to pave a public street could not be enforced without making the city of Chicago a party, if it could be enforced at all. Inasmuch, therefore, as the appellees accepted the contract with full knowledge that it could not be enforced without the consent of a third party, and that its validity depended upon the exercise of the will of a third party, they cannot enforce the specific performance of such contract by the present bill. The street had not been paved when the present bill was filed on July 21, 1897, although by the terms of the contract it was to be paved not later than December 1, 1896. The city did not make it a condition to the grant to the Calumet Company of the right to lay down its tracks in the street that the company should pave the street, nor did the city in any way take any steps toward the paving of the street, or authorize any other person or corporation to do so. The fair inference, therefore, is that the city did not regard the paving of the street as a necessity, or as an act to be done for the benefit of the public. Knowing all this when they filed the

present bill, appellees were not entitled to a specific performance of the contract.

This being so, there can be no decree in the present case for damages, that is to say for the amount of the check for \$1,000 and interest thereon. Where, in a bill for specific performance, a court of equity grants a decree for damages, the decree for damages is merely ancillary to the relief of specific performance, and is the result of granting that relief. But where the bill makes no case for a specific performance and shows no ground for such relief, a court of equity will not decree damages, because a court of equity does not sit for the purpose of entertaining bills whose only object is to secure damages. The remedy in such case is at law, and not in equity.

It has been held in a number of cases that a bill for specific performance will not be retained to assess damages for a failure to perform a contract where the complainant, when he filed the bill, knew that the vendor had parted with the title to the property, or where the agreement is to convey property which has no existence, or to which the defendant has no title, and if the want of title was known to the complainant at the time of beginning suit. In all such cases, the bill will not be retained for the assessment of damages. *Doan, King & Co. v. Mauzey*, 33 Ill. 227; *Stickney v. Goudy*, 132 Ill. 213, 23 N. E. 1034; *Kennedy v. Hazelton*, 128 U. S. 667, 9 Sup. Ct. 202, 32 L. Ed. 576; *Hurlbut v. Kantzler*, *supra*; *Sellers v. Greer*, *supra*; *Mack v. McIntosh*, 181 Ill. 633, 54 N. E. 1019. The principle of these cases is applicable here. The appellants, who made an agreement to pave a public street of the city of Chicago, had no right to control the street, and no power, without the consent of the city, to make any improvement of the street; and, this fact being well known to the appellees at the time of the beginning of this suit, the present bill, under the authorities referred to, will not be retained for the assessment of damages.

For the reasons above stated, the judgment of the Appellate Court and the decree of the Circuit Court are reversed, and the cause is remanded to the Circuit Court with directions to dismiss the bill.

Reversed and remanded.

Russell v. Chicago & Milwaukee Electric Railway Co.

(Illinois — Supreme Court.)

1. **DEDICATION OF PUBLIC STREETS; ACCEPTANCE BY MUNICIPALITY.**— Where private property is platted by the owners showing proposed streets and lots and such lots are sold with reference to such plat, the streets so laid out are not absolutely dedicated to a public use until accepted by the proper municipal authorities by some unequivocal declaration or act. Until such an acceptance the fee of such streets does not vest in the municipality.
2. **EXCLUSIVE RIGHT TO USE STREETS.**¹— A municipality cannot grant to a street railway company the right to use a public street in such a way as to exclude the public therefrom. It is, therefore, unlawful for a street railway company to erect in the street an obstruction in the nature of a trestle or embankment which will preclude the public from using any portion of the street.
3. **INJUNCTION RESTRAINING STREET RAILWAY COMPANY FROM USE OF STREET NOT DEDICATED.**— An injunction will lie against a street railway company compelling the removal of its obstructions upon lands not yet dedicated for street purposes.

APPEAL by complainant from judgment of Appellate Court modifying a judgment for the defendants. Decided October 26, 1903. Reported 205 Ill. 155, 68 N. E. 727.

Bowen W. Schumacher (*Louis Zimmerman*, of counsel), for appellant.

Wood & Oakley, for appellees.

Opinion by RICKS, J.

This was a bill in chancery filed in the Circuit Court of Lake county on May 19, 1899, by Anna May Russell against the

1. **Exclusive right to use street.**— Under the authority usually delegated to municipalities an exclusive or perpetual right to use a street for a street surface railroad cannot be conferred. *Nellis Street Surface Railroads*, p. 56. A statute in general terms authorizing a municipality to grant a franchise for the use of its streets to a street railroad company will not be construed to permit the municipality to give a company the exclusive or perpetual right to operate a street surface railroad in a public street. *Detroit Citizens' St. Ry. Co. v. Detroit Ry. Co.*, 171 U. S. 48, 43 L. Ed. 67.

A city cannot confer upon a street railroad company the exclusive right to use one of its streets for its own business. *Grand Ave. Ry. Co. v. People's*

Chicago & Milwaukee Electric Railway Company and the North American Railway Construction Company, praying for a temporary injunction restraining the defendants from constructing an electric street railway and certain trestle-work and from cutting trees and erecting telegraph poles in front of complainant's premises, upon what was known as Railroad avenue. The bill also asked that upon a final hearing said Chicago & Milwaukee Electric Railway Company be perpetually enjoined from the

Ry. Co., 6 Am. Electl. Cas. 99, 148 Mo. 665, 50 S. W. 305; St. Louis Transfer Ry. Co. v. St. Louis, etc., Terminal Ry. Co., 111 Mo. 666, 20 S. W. 319; Birmingham, etc., Ry. Co. v. Birmingham St. Ry. Co., 78 Ala. 465.

While the Legislature can authorize municipal authorities to permit private corporations to construct and operate street railway lines upon the streets, the authority thus conferred must be exercised within the limits of reasonable discretion, and not so as to materially injure the property of abutting owners. The entire width of the street cannot, under general legislative authority, be given up to railroad purposes. *Block v. Salt Lake City R. T. Co.* (Utah), 4 Am. Electl. Cas. 189.

Right as affected by narrowness of street.—A municipality has no authority to grant a right to lay a street railroad track in an alley and operate cars thereon, where, by reason of the narrowness of the alley and the frequency with which the cars are required to be run, it would result in the loss of the use of the alley to the abutting owners. *Watson v. Robertson Ave. R. Co.*, 69 Mo. App. 548.

Acceptance of street by municipality.—If an owner of land plat it into lots within the city limits and plat a public street thereon and sell lots with reference thereto, and then execute a warranty deed to a railroad corporation conveying a right to construct and operate a street railroad upon the street according to the plat thereof, with all the rights incident to the operation of railroads, the company does not thereby acquire an exclusive use of the entire street for railroad purposes. Its right in the street is subservient to the control of the municipal authorities whenever the street is accepted as one of the public streets of the city. *Nellis Street Surface Railroads*, p. 240 (citing *Murray Hill Land Co. v. Milwaukee Light, Heat & T. Co.* (Wis.), 86 N. W. 199).

Method of construction of street railway.—A street railroad company may be compelled by a municipality to so lay its tracks in the street that carriages can easily pass over them. *North Chicago City Ry. Co. v. Town of Lake View*, 105 Ill. 183. The rule is that a highway or street in which a street railroad is constructed must be maintained as nearly as possible as fit for the use of the public, who travel on foot or in vehicles, as it was before the construction of the railroad, having due regard to the necessity for the rails being there. *Nellis Street Surface Railroads*, p. 242. If the manner of the construction is within the jurisdiction and control of the municipal authorities

further construction of said proposed work, and from operating and maintaining a system of electric railways over said so-called Railroad avenue in front of complainant's premises, which alleged street in front of her premises complainant claimed to own, and that the defendants be required to remove the obstructions theretofore placed by them in said alleged street, and to restore the latter to its former condition. A temporary injunction was granted in accordance with the prayer of the bill. Afterward, on June 7, 1899, the injunction, which had extended over the full width of the strip of land known as Railroad avenue, which was sixty-six feet, was dissolved as to the west thirty-three feet thereof, upon the defendant's giving bond in the sum of \$5,000, conditioned for the payment of the amount of any judgment or decree or the award of any arbitrators that might be entered against them in favor of complainant for damages caused by the use of the west thirty-three feet of the said Railroad avenue opposite complainant's premises. Defendants having afterward filed an answer to the bill, and complainant her replication thereto, a hearing was had, and on March 6, 1900, a decree was entered, from which an appeal was taken to the Appellate Court, and from the judgment affirming and reversing the decree in part this appeal has been perfected.

The evidence upon which the decree in this case is based is not incorporated in the record by means of a certificate of evidence, and consequently the facts recited in the decree must be taken as true. If the findings of the decree are sufficient, it must be

a court of equity cannot interfere. *Rankin v. St. Louis & B. Sub. Ry. Co.*, 98 Fed. 479. An ordinance permitting a street railroad company to use certain streets and prescribing the use of certain kinds of rails is not such a contract as precludes the municipality from subsequently requiring the company to change the rails so as to conform to the street pavement, without the company's assent. The regulations which the municipality may impose are not limited to the time when the road is built. *Pawcatuck Valley St. R. Co. v. Town Council*, 47 Atl. 691. See also *Albany v. Watervliet Co.*, 45 Hun (N. Y.) 442, affirmed, 108 N. Y. 14; *Easton, etc., Pass. Ry. Co. v. Easton*, 133 Pa. St. 505, 19 Atl. 486. A municipality may require a railroad company to conform to the grade of the rest of the street; and if the street grade be changed, thereby requiring the change of grade of the railroad, the company owning the road has no valid claim for damages. *Ashland St. Ry. Co. v. Ashland*, 78 Wis. 271, 47 N. W. 619.

sustained; if not, it must fall. The decree in this case was a very lengthy one, and contained findings on many different questions. The case turns largely upon the question whether said Railroad avenue is a street or highway, or whether the appellant is the owner of the title to the same. We will refer only to such of the findings as are necessary to make clear the grounds upon which we act in disposing of the case.

It appears from the recitals of the decree that on the 7th day of June, 1873, Jacobs and Gurnell executed a plat subdividing into lots, blocks, streets, and avenues a portion of section 36, town 43, range 12, and of fractional section 13, town 43, range 13, in the county of Lake. The lands so subdivided adjoined the city of Highland Park on the south, and the plat was entitled as "South Highland Addition to Highland Park." The plat was acknowledged before a proper officer, and certified by the county surveyor of Lake county, and recorded in the office of the county recorder. The streets and avenues were shown on the plat to be sixty-six feet in width, and the length and width of the lots, as stated on the plat, extended to the middle of the streets and avenues, but the plat showed distinct boundary lines of the streets and avenues and of the lots. The plat showed the names of the different streets and avenues, and the numbers of the respective lots. The appellant on the 21st day of May, 1892, became the owner of lots 151, 152, and 153, which, as shown by the plat, abutted on a strip of land designated "Railroad Avenue" on the plat. The former owner of the lots had erected thereon a two-story frame dwelling and a barn, both of which faced upon the said Railroad avenue, and are now occupied by a tenant of the appellant. Said Railroad avenue furnished the only means of ingress or egress to or from the lots, there being no alleys marked on the plat. The land adjoining Railroad avenue on the west is the right of way of the Chicago & Northwestern railway, and is not included in the platted ground. The city of Highland Park extended its limits southward over a portion of the platted ground, so that the city limits passed along the north line of appellant's northernmost lot, being lot No. 151, but did not bring any part of either of said lots, or the street in front of them, within the corporate limits. The strip marked on the plat as

Railroad avenue is a continuation of a street of the same name in the city of Highland Park, and said city improved a portion of said strip in that portion of the plat over which the city limits were extended, by grading the roadbed and laying a sidewalk. A sidewalk four feet in width had been constructed in 1892 by public contributions—that is, by voluntary subscription by the property holders—and has since been maintained on the east line of Railroad avenue, adjoining the west line of appellant's three lots; and also a bridge for foot passengers, in connection with said sidewalk, had been constructed across a ravine, by funds raised in the same manner as those provided for the walk. The town of Deerfield (the county of Lake being under township organization) built a culvert on said Railroad avenue about 110 rods south of appellant's lots. The ravine rendered Railroad avenue impassable for teams in the block on which appellant's lots abutted. The passenger depot of the Chicago & Northwestern Railway Company was on Railroad avenue, about 500 feet south of appellant's lots. Access to her lots was obtained from the south by means of Railroad avenue. In front of her lots and up to the ravine at the north end thereof there was a natural growth of trees on said Railroad avenue. On the 27th day of June, 1891, the commissioners of highways of the town of Deerfield, by a resolution, accepted the following streets marked on said plat: A portion of Roger Williams avenue, which opens upon Railroad avenue 176 feet south of appellant's lots, and Judson avenue from the city limits of the city of Highland Park southward. The city of Highland Park, some time prior to 1899 (not more clearly fixed by the decree), accepted the territory within the plat to the north line of appellant's lots, including the strip of ground marked "Railroad avenue."

The court further found that up to the 9th day of May, 1899, said subdivision, as hereinbefore set forth, was a portion of the town of Deerfield, and that on said date said subdivision was annexed to the city of Highland Park, pursuant to the statutes of the State of Illinois in that behalf, and that on said 9th day of May, 1899, the city council of the city of Highland Park passed the ordinance of annexation, in and by which the city clerk was directed to prepare and file with the recorder of Lake county, Ill.,

a copy of the ordinance of annexation, together with an accurate map of said annexed territory, and that pursuant to said ordinance the clerk of said city did thereafter, on the 17th day of May, 1899, file with the recorder of Lake county, Ill., a copy of said annexation ordinance, and a map or plat of said premises, which said plat was prior to the filing thereof duly acknowledged by the mayor of said city, and that on said plat appear the streets, avenues, and lots in precisely the same form as in plat of South Highland addition to Highland Park, and two ordinances of the city of Highland Park, passed and approved July 14, 1899, and August 1, 1899, respectively accepting, by name, certain streets in the annexed territory of Ravinia, but not including in either of said ordinances said so-called Railroad or Railway avenue. The court further found that the appellee railway company was incorporated under the laws of the State, and had authority to build, operate, and maintain a street railway; that on the 1st day of March, 1899, it petitioned the board of supervisors of the county of Lake to grant it the right of way over the strip of ground marked on the plat as Railroad avenue, from the south line of the corporate limits of the city of Highland Park (which at that time was at the north line of appellant's lots) to the southern terminus of said avenue; that the petition was accompanied by a petition of the requisite number of property-owners, and was granted by said board; that under color of this grant said railway company, through the appellee construction company, entered upon said Railroad avenue, and began the construction of its road there, including an embankment and a bridge in the avenue across the ravine at the north end of appellant's property.

The block in which appellant's property is situated is bounded on the north by Marsham street, on the east by Judson avenue, on the south by Roger Williams avenue, and on the west by Railroad avenue. There is no alley through the block, and there are lots belonging to other persons to the north and south of her, so that there is no access to her property, other than over Railroad avenue. As to the contour and the lay of the street in front of appellant's property, the decree finds that said lots and street gradually decline from Roger Williams avenue north to a point 100 feet north of the south line of lot 151, which is appellant's

northernmost lot, at an average grade of from two to two and one-half feet to the 100 feet, at which point the surface of said lots on said avenue declines sharply into the ravine, said ravine being about twenty feet deep and 180 feet across, and that the said Railroad avenue and the lots of appellant have the same general characteristics as to grade and ravine. Appellant's lots count from north to south; lot 151 having a frontage of $255\frac{1}{2}$ feet, and lots 152 and 153 each having a frontage of 100 feet, making her total frontage $455\frac{1}{2}$ feet. As to the character of the grade and trestle built by appellees in front of appellant's property on the west thirty feet of said Railroad avenue, the decree finds, substantially, that appellees constructed, on a level and without regard to the natural grade of the said Railroad avenue, and beginning at the south of appellant's premises, a three-foot embankment, to a point forty-one feet north of the south line of lot 153, and from that point north, the full length of appellant's premises, appellees constructed a trestle, consisting of four piles driven in the ground crosswise, twelve inches in diameter, thus forming piers, which were built every twenty feet apart in front of said lots and along said depression and across said ravine, and the trestle-work, as thus constructed, varied in height from about three feet at the point of beginning to twenty-five feet at the ravine, and that in front of the dwelling-house upon the appellant's premises the said trestle extended six feet above the natural grade. The roadbed and trestle were designed for a double-track electric railway. The injunction prayed in the case was to restrain the further prosecution of this work by the appellee companies. After the dissolution of the temporary injunction that was granted, and the filing of a bond by appellees in the sum of \$5,000, conditioned for the payment of any damages appellant might, by suit or arbitration, establish, appellees proceeded to build and put in operation said electric railway, and the same was in full operation at final hearing of this cause.

The appellant was one of the signers of the petition upon which the board of supervisors acted in granting the appellee company the right of way on said avenue. The decree finds she was not thereby estopped to ask the court to restrain the construction of the railway in Railroad avenue, for the reason that a represen-

tative of the appellee company, who presented the petition to her for her signature, induced her to sign it by representing to her, to quote from the decree, "that in front of her said premises, as aforesaid, down to the edge of the ravine, said Chicago & Milwaukee Electric Railway Company would place its tracks on the natural grade of said land, and build a broad bridge over the ravine, thereby saving her a large amount of special assessments. Thereupon, on said representations, complainant signed said petition"—and that though the engineer of the company, on her complaint that the embankment was higher than had been promised her, reduced it two or three feet, and to the lowest possible grade consistent with the safe operation of the road, along its tracks and on and over the bridge across the ravine, and turned the grade several feet farther from appellant's lots to the westward, yet "that the height of the grade was higher than the grade promised by the company." The court further found that the appellee company had not compensated or offered to compensate the appellant for the right of way along said avenue, or for the damages occasioned to her lots by reason of the construction and operation of the road.

On the theory, to quote from the decree, "said so-called Railroad avenue, though it had been dedicated, by reason of said plat, for public use, had never been accepted by the proper public authorities or by user of the public, and until accepted by the proper public authorities or user of the public is and was not subject to the jurisdiction of the county board of the county of Lake as a public highway, or for any other purpose," and that the complainant, therefore (to quote again), "owned the fee to the whole of said Railroad avenue in front of her said lots, subject, however, to the rights of the public to accept said so-called Railroad avenue as a street, should they wish to do so," and for the reason it appeared to the court that the damages sustained by the complainant by reason of the wrongful acts complained of in her said bill of complaint are relatively small in comparison with damages that would accrue to the defendant company should the operation of said road as now located be enjoined, or should the defendant railway company be directed by the mandatory injunction of this court to remove its said tracks and trestle in front

of complainant's premises, and that said premises are not occupied by complainant as her homestead, but are rented, when tenants therefor can be had, as a source of income to complainant, and that the damage to complainant's said lands by reason of the occupation of the west twenty-five feet of Railroad avenue in the manner hereinbefore described in this decree could be made good to her by a money judgment, it was ordered, adjudged, and decreed that an issue be made up in this cause, to be tried by a jury or by the court, as the parties shall elect, in which issue shall be tried the following questions, and a single money judgment therefor shall be entered herein in accordance with the verdict of the jury or the finding of the court: First, the value of the west twenty-five feet of said Railroad avenue in front of appellant's lots; second, the damages to said lots 151, 152, and 153 which they have sustained or may sustain by reason of the construction of said trestle and structure and roadbed and the operation of the railway upon the west twenty-five feet of said Railroad avenue as aforesaid. And it was ordered that the defendant railway company shall pay all costs of this proceeding, to be taxed by the clerk, including a reasonable solicitor's fee for the complainant's solicitors, and that the value of the lands taken, and of the damages to the residue of complainant's lots, be ascertained as hereinbefore provided; "that the appellant should proceed to have her damages ascertained within the period of six months, and should the defendant company fail to pay the money judgment so to be rendered against it within the period of thirty days after the rendition thereof in the trial court, but should make default, that said railway company be and are hereby perpetually enjoined from operating and maintaining its system of street railway upon the embankment and trestle-work erected in front of appellant's lots, and from operating and maintaining a system of electric railways over, across, and upon said so-called Railroad avenue in front of said lots, as aforesaid, and should remove said embankment and trestle-work in front of complainant's said lots, and to restore the said strip of land known and described as Railroad avenue, as near as may be, to the condition it was before the defendants, or either of them, committed the said injuries and trespass," etc.

Appellant, being dissatisfied with the relief granted by the

decree of the Circuit Court, prosecuted an appeal to the Appellate Court for the Second District. The Appellate Court affirmed the decree, except as to the provision ordering appellant to institute proceedings to have her damages ascertained, and the provision requiring the parties to have the issue tried by a jury or by the court, as the parties might elect, and remanded the cause, with directions to the Circuit Court "to modify the decree so as to provide that the proceedings to condemn be instituted by the railway company, and that the issue to be made up be tried by a jury, unless the parties waive a jury and elect to try it by the court." The appellant has perfected this appeal to this court to secure a reversal of the judgment of the Appellate Court.

From our examination of the decree and record before us, we concur in the conclusions reached by the chancellor that Railroad avenue, along the block in which appellant's property is located, is not a public highway, and that the action of the board of supervisors of Lake county, purporting to grant to the appellee, the Chicago & Milwaukee Electric Railway Company, the license or authority to construct its road over said portion of said Railroad avenue, was void, for the reason that although said Railroad avenue was shown upon the plat of the addition in which appellant's premises are situated, and although the plat was in compliance with the statute, the making and recording of such plat amounted to no more than the offer to dedicate the streets and avenues shown thereon, and, until accepted by the proper authorities in some of the modes known to the law, there was no highway; and the decree finds, and we think upon sufficient facts, that there was no such acceptance by the county or township authorities upon which to predicate any action by the board of supervisors extending or granting to said electric railway company authority to use or occupy the same as a public highway. To constitute a public highway by dedication, whether statutory or otherwise, two things are necessary: There must be a dedication or offer to dedicate and there must be an acceptance of such dedication by the proper public authorities. *Fisk v. Town of Havana*, 88 Ill. 208; *Littler v. City of Lincoln*, 106 Ill. 353; *Jordan v. City of Chenoa*, 166 Ill. 530, 47 N. E. 191; *Village of Augusta v. Tyner*, 197 Ill. 242, 64 N. E. 1127; *Willey v. People*, 36 Ill.

App. 609. And in such case, where the highway is claimed by dedication, the acts of both the donor and the public authority should be certain — of the design to dedicate on the one part and to accept and appropriate to public use on the other. *Grube v. Nichols*, 36 Ill. 92. The owners of the lands included in South Highland addition to Highland Park having platted the same, and having shown on the plat a number of the streets — among them the street in question — and having sold property with reference to such plat along said Railroad avenue, they and their privies and successors in title are estopped, as against purchasers and holders of property in such addition, and bought with reference to such plat, to deny the existence of such streets and passageways, as held in *Earll v. City of Chicago*, 136 Ill. 277, 26 N. E. 370; *Clark v. McCormick*, 174 Ill. 164, 51 N. E. 215; and other cases that have been before this court. But these cases only go to the extent of establishing the private right of the property holder, as contradistinguished from the right of the public to have such designated streets remain open for their access, and the access of those who may have occasion to travel such streets in connection with the property thus conveyed. They do not go to the extent of declaring streets and passageways thus established as public highways, because, after all, until some affirmative act which makes certain the purpose of the municipal authorities to accept such offer of the streets as public highways, they still stand as mere offers of dedication. It does not lie within the power of the individual who may elect to plat and sell his property with reference to such plat to impose upon the public authorities, merely by his own act, the burden of the care and responsibility of such dedicated streets and passageways as public highways, until those authorities representing the public have seen fit, by some unequivocal declaration or act, to accept and assume such burden and liability. *Littler v. City of Lincoln*, *supra*; *Jordan v. City of Chenoa*, *supra*; *City of Chicago v. Gosselin*, 4 Ill. App. 570. And until the proper municipal authorities do accept the streets thus dedicated, and public highways, the fee of the streets does not vest in the municipality. *Hewes v. Village of Crete*, 175 Ill. 348, 51 N. E. 696; *Hamilton v. Chi-*

cago, Burlington & Quincy R. Co., 124 Ill. 235, 15 N. E. 854; *Jordan v. City of Chenoa*, *supra*.

It is said, however, by appellees, that, prior to the filing of the bill in this case, Highland Park, on the 9th of May, 1899 — ten days before the filing of the bill — extended its city limits by taking in the whole addition in which the avenue in question is located. The mere acceptance of the plat by the municipal authorities, and the inclusion of the territory covered by the plat within the limits of the municipality, was not an acceptance of the dedication of the streets and passageways shown upon the plat. The municipality still had the right to elect what streets shown upon the plat should become public highways, and public charges upon the municipality with reference to their maintenance; and, although certain streets had been accepted, the street in question was not one of them. *Little v. City of Lincoln*, *supra*; *Jordan v. City of Chenoa*, *supra*.

It is apparent from this record that the appellee electric company is what is known as a "street railway company," acting under the Horse and Dummy Act, or Street Railroad Act; and, even if it could be held that the *locus in quo* was a street or public highway, appellant should still have her injunction. While the county or municipal authorities may grant to such companies the use of the highways, it is only the use in common and in connection with the public that they may grant. Such companies cannot appropriate the whole or any portion of such streets and highways to their exclusive use and control. The statute conferring the right to occupy the streets and highways contains the express limitation that such occupancy and use shall be "in such manner as not to unnecessarily obstruct the public use of such street, alley, road, or highway." Hurd's Rev. Stat. 1899, chap. 131a, § 1. Where it is established by proof, or admitted, that the *locus in quo* is a public highway, the property-owner, ordinarily, is presumed, in law, not to suffer damages from the proper construction thereon of such railroads, upon the theory that such use is compatible with the use in common with the public, and does not impose upon such street or highway an additional servitude. But this is upon the theory that such street railways shall follow the natural contour of the surface of the streets. In the

case at bar, however, for the full length of appellant's property, the electric company has appropriated exclusively to its own use at least twenty-five feet of the highway; has erected an obstruction in the street ranging from two to three feet high at the south end to about twenty-five feet at the north end, gradually and constantly increasing from where it begins at the south until the extreme is reached at the north. The decree finds that appellant was the owner of the entire street, subject to the offer of dedication, and subject to its acceptance by the public authorities. If it were not a public highway, the public authorities had no power to confer license upon the electric company to enter upon it for any purpose. If it were not a public highway, and the electric company was a street railway, or operating under the Street Railway Law, it did not have and could not acquire any right to enter upon the same, except for special reasons and under peculiar circumstances, not shown by this record to exist. *Harvey v. Aurora & Geneva Ry. Co.*, 174 Ill. 295, 51 N. E. 163; *Harvey v. Aurora & Geneva Ry. Co.*, 186 Ill. 283, 57 N. E. 857. The *locus in quo* not being a public highway and the fee being in appellant, it was the duty of the electric company to bring itself within the exception to the rule by which it might occupy other territory than a public highway, and to compensate appellant for her damages before constructing its road. It may be that appellees and appellant were both mistaken as to the law, but that fact cannot alter the law or deprive the appellant of her remedy. When this bill was filed appellees were merely in the act of constructing the roadbed and trestle, and pending the litigation they have gone on and completed and put in operation the electric railroad. This they did at their own hazard, and, whatever burden attaches, they must bear it.

The Circuit Court of Lake county erred in decreeing a bond to be taken from appellees, and requiring appellant to institute proceedings for her damages, and in not granting the injunction. The Appellate Court erred in modifying that decree, and directing that the appellee electric railway company should proceed to condemn the right of way, and in requiring appellant to pay any portion of the costs. The decree should have been for a mandatory injunction. The decree of the Circuit Court of Lake

county, finding that there was no public highway, and that appellant was the owner of the *locus in quo* (and in all other matters except that portion of the decree finding that the appellee, the Chicago & Milwaukee Electric Railway Company, might maintain its track upon said street or avenue, and that appellant should bring proceedings to establish her damages and denying a mandatory injunction), is approved. The judgment of the Appellate Court affirming the decree of the Circuit Court is affirmed, except in so far as it sustains the Circuit Court in denying the mandatory injunction and remanding the cause with direction, and modifies the decree so that the electric company should be required to proceed to condemnation of the right of way, and taxes costs against appellant, in which latter respect the judgment of the Appellate Court is reversed. The cause is remanded to the Circuit Court of Lake county, with direction to that court to amend its decree by granting a mandatory injunction requiring the Chicago & Milwaukee Electric Railway Company to remove said trestle-work and embankment and its said tracks and railroads from said so-called Railroad avenue in front of appellant's premises. The appellees will be required to pay the costs of this proceeding in all of said courts.

The injunction here directed shall not be held to be conclusive of the right of appellee, the Chicago & Milwaukee Electric Railway Company, to prosecute condemnation proceedings, as this court, on the record before it, is unable to say whether such conditions existed as authorized said electric company to deviate from the public highways.

Reversed in part and remanded, with directions.

Village of Winnetka v. Chicago & Milwaukee Electric Ry. Co.

(Illinois — Supreme Court.)

ORDINANCE OF VILLAGE AUTHORIZING CONSTRUCTION OF VIADUCT.—An ordinance authorizing the construction of a superstructure or trestle in a street of a village, upon condition that the street railway company cause additional lands to be dedicated for street purposes, is authorized. The village is estopped from insisting upon the removal of any portion of such superstructure or trestle-work because it extended beyond the limits specified in the ordinance, where such work was done under the supervision of the village president and village engineer, both of whom had knowledge that the company was using more than the specified portion of the street.

APPEAL by plaintiff from a judgment of the Appellate Court, affirming a decree for the defendant. Decided October 26, 1903. Reported 204 Ill. 297, 68 N. E. 407.

Stacy W. Osgood and Millard F. Riggle, for appellant.

Wood & Oakley, for appellee.

Opinion by Boggs, J.

The appellee company is the successor and assignee of the Bluff City Electric Railway Company. In the year 1898 the former company entered upon the enterprise of building an electric railway, the line whereof passed through the limits of the appellant village. An ordinance was adopted by the village council on the 24th day of May, 1898, authorizing the construction of the railway along Wilson street and across Willow, Maple, and Ash streets of the village, and also across other of its streets not necessary to be mentioned. Nor is it necessary the terms and conditions which were by the ordinance and an agreement of the company annexed to the grant should be set forth in full. Of these conditions it is only necessary to mention that the ordinance permitted the use of the streets to the width of twenty-five feet by the railway company, and that the ordinance, and the agreement of the company which became a part thereof, required the railway company to purchase a strip of land not less than forty-two feet in width, extending from Maple avenue to Willow street, and to dedicate

said strip of land to the village for use as a public street, to be called "Wilson Street Extended," and to macadamize the roadway of the street, put in the curbing, and lay a sidewalk on the easterly side of the street; said street improvements to be made under the supervision of the village authorities. The ordinance and the agreement provided that said strip of land so to be dedicated and improved by the railway company, and to constitute Wilson street extended, should be subject to the right of the railway company to use the west twenty-five feet thereof for its right of way for the period of twenty-five years. The railway company procured the necessary ground and entered upon the construction of the railway and the fulfillment of its obligations under the ordinance.

The ordinance authorized the construction of a line of street railway upon the surface of the ground. It was subsequently ascertained that the conformation of the surface at the crossing of Willow street and Wilson street, and for a short distance along Wilson street and the proposed Wilson street extended, was such that it would be impracticable for the company to lay the track of the road along the surface of the ground, and that the operation of the road along a track on the surface of the ground would be dangerous to the life and limb of passengers and of the public using the street. It was, therefore, deemed advisable the road should be carried over the depression on an elevated structure. Profiles of the viaduct, which, in the opinion of the engineers of the railway company, should be constructed for that purpose, were prepared and laid before the village council. In view of this situation the council, on the 7th day of March, 1899, adopted an amendatory ordinance, the record whereof in the book of the record of the proceedings of the council reads as follows: "The council of the village of Winnetka do ordain that the ordinance heretofore granted on the 20th day of May, 1898, to the Bluff City Electric Street Railway Company, be and is hereby amended to give said company, its successors and assigns, the right and authority to construct a superstructure or trestle on the west twenty feet of the right of way heretofore granted, between the west line of Maple street and the south line of Willow street, and on Wilson avenue from the south line of Willow street to such

point as will make the grade on said trestle-work about 1 per cent. Said right and authority are given upon the express condition that said Bluff City Electric Street Railway Company, its successors or assigns, shall cause to be dedicated to the village of Winnetka, for street purposes, the east thirty-six feet of Wilson avenue, extending to the south corporate limits of said village."

The railway company entered at once upon the construction of the viaduct. It was built of the width of about twenty-three feet. In the month of July, 1899, the viaduct was completed, and the tracks of the railway laid thereon, and the company was ready to operate its cars along the track and over the viaduct. The company was then notified by the president of the village that the village claimed under the amendatory ordinance the company was only authorized to occupy twenty feet of the street, and that its viaduct exceeded that width, and was to that extent unlawfully upon the street. The company contended that the amendatory ordinance as adopted by the council had not been properly recorded in the record book of the village, and that, as adopted, the width of the right of way theretofore granted by the former ordinance was not changed, but was expressly recognized and stated in the amendatory ordinance, as the same was adopted, to be twenty-five feet, and also contended that the provisions of the former ordinance and agreement permitting the company to occupy twenty-five feet of the street was not intended to be changed or affected by the amendatory ordinance, and that under a proper construction of the amendatory ordinance, even as it appeared upon the record, the width of the right of way of the company in the street as fixed by the former ordinance was in no wise reduced or affected. The amendatory ordinance which was introduced into the council and voted upon and adopted could not be found, but the railway company produced a copy thereof, duly certified under the hand and seal of the clerk of the village. This certified copy was made by the village clerk after the adoption and passage of the ordinance, but before the same was copied at large in the book in which the ordinances of the village were recorded. The width of the right of way of the appellee company in the street referred to in the amendatory ordinance was shown by this certified copy to be twenty-five feet.

Acting upon the authority of a resolution of the village council, the proper official of the village notified the railway company that it was a trespasser upon the street to the extent of five feet beyond its right of way, and demanded that it should within ten days remove all portions of its viaduct from said five feet of the street. The appellee company thereupon filed its bill in chancery for a writ of injunction restraining the village from in any way interfering with the viaduct, or its use of the same in the operation of its cars. A preliminary injunction was issued as prayed, and upon a final hearing a decree was rendered making the same perpetual. The village prosecuted an appeal to the Appellate Court for the First District, and, the decree being affirmed by that court, has perfected this its further appeal to this court.

The master to whom the case was referred, upon consideration of all the evidence bearing upon the point, found that the original pencil draft of the amendatory ordinance "was, on its face, in terms a grant of the use of the entire twenty-five feet constituting the original right of way under the said ordinance of May 24, 1898, and that said certified copy of said ordinance of March 7, 1899, introduced in evidence as the complainant's 'Exhibit D,' was prepared by said clerk of said village from said original pencil draft of such ordinance of March 7, 1899, so preserved in his said office, on or about the 13th day of May, A. D. 1899;" and this finding we think to be well supported by the proofs. The decree, however, was granted upon the theory the village had become equitably estopped from demanding the superstructure beyond the width of twenty feet should be removed from the street.

The general principle relative to the power of the village to remove any structure in a street which excludes the public from the use of that portion of the street is not entirely applicable to the situation. This portion of Wilson street was created under an agreement between the village and the railway company that the company should purchase the ground upon which the street was to be extended, and dedicate it to the village, for the purpose of devoting it in part to the use of the railway company. Moreover, beyond the limits of the viaduct at least thirty-two feet of the street remained open for the free and uninterrupted use of the public at a point where there had before been no public way; and,

still further, the ground under the greater portion of the viaduct was so rough and uneven that the public could not have used it unless improved, at great cost, for such use. The use of a street for street railway purposes is not an illegitimate use of the public way, as we have frequently declared. The viaduct may exclude the public to some extent from the use of parts of the street, but in *Summerfield v. City of Chicago*, 197 Ill. 270, 64 N. E. 290, we held that if a city council, acting in good faith, for the best interests of the public, in the matter of elevating railroad tracks at the junction of two streets, determines that the safety of the public will be best conserved by providing a subway and supporting the tracks by means of walls in the street, courts will not declare such action unauthorized merely because the plan adopted would result in excluding the public from that portion of the street which would be occupied by the walls of the subway.

We think the proof amply warranted the decree on the ground the village should be deemed equitably estopped to demand that the viaduct, or any portion thereof, should be removed from the street. The viaduct was constructed by the company in the belief it had a right to use twenty-five feet of the street. This belief was grounded upon the original ordinance granting it the use of the street to that extent, and also upon a certified copy of the amendatory ordinance, which was entirely consistent with that view. From practically the beginning of the work of constructing the viaduct the president of the village council and the village engineer, both acting in their representative official capacities, and the latter in obedience to a provision of the ordinance of the village, had actual knowledge that the company was using more than twenty feet of the street in erecting the viaduct. The original ordinance provided that all the work on the street should be done under the supervision of the village engineer. That official performed that duty in the construction of the viaduct, and the president of the village frequently inspected the work as it progressed, and the manner of building the viaduct was the subject of discussion at different times between these officials of the village and those acting for the railway company in the building thereof, and changes in the work were made at the request of the village authorities. Though it was then well known by the village

authorities that the structure occupied more than twenty feet of the street, no objection was made thereto until the viaduct had been entirely completed, the track laid thereon, and the structure was ready for the operation of trains over it. Upon the clearest principles of right and justice the village should not be allowed to then insist that the viaduct should be removed, and such great pecuniary loss and sacrifice be inflicted upon the railway company. That equitable estoppels of this nature may be declared and enforced against municipal corporations, when good conscience and justice demand, has long been the doctrine of this court. *City of De Kalb v. Luney*, 193 Ill. 185, 61 N. E. 1036, and many cases there cited.

The bill alleges that a clerical error was made by the village clerk in transcribing the mandatory ordinance upon the record, whereby the clerk omitted to copy the word "five" in that part of the ordinance which refers to the width of the street to be occupied by the railway company as a right of way, thus leaving the width of the street to be used to appear to be twenty feet instead of twenty-five; and the special prayer of the bill was that this clerical error in the record should be amended. The insistence, however, that the relief to be given must be limited by this special prayer of the bill, is not well made. The bill contained a general prayer for such further or other relief as the nature of the case may require and as to equity and good conscience may seem meet. "The rule is, where a bill contains a prayer for special relief, and also a prayer for general relief, the complainant may be denied a decree for the relief specially prayed for, and under the general prayer be granted such relief as he may be found entitled to have under the allegations of fact made in the bill and the proof in support thereof." *Gibbs v. Davies*, 168 Ill. 205, 48 N. E. 120. The allegations of the bill in the case at bar disclosed all the facts necessary to be known to entitle complainant to a decree on the ground the village should be equitably estopped, and the general prayer for relief authorized the granting of a decree based upon that principle of equity jurisprudence.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

Knickerbocker Ice Co. v. Benedix.

(Illinois — Supreme Court.)

1. **INJURY TO CONDUCTOR BY BEING STRUCK BY POLE OF WAGON.**—The plaintiff, a street-car conductor, while engaged in the performance of his duties, and standing on the running-board of his car, was injured by being struck by the pole of an ice wagon belonging to the defendant. It appeared that the horses were being driven so fast that the driver was unable to stop them in time to avert the injury. The employees of the defendant upon the wagon were shown to have been intoxicated. It was held that under the circumstances it was the duty of the driver of the team to stop, and his failure so to do was negligence of the defendant.¹

1. **General rule as to liability of master for negligence of servant.**—A master is liable for the injuries resulting from the negligence of his servant while in the lawful and authorized employment of the master. *Christian v. Irwin*, 125 Ill. 619; *Toledo, W. & W. R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489; *American Express Co. v. Haggard*, 37 Ill. 465, 87 Am. Dec. 257; *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 352; *Louisville, etc., R. Co. v. Willis*, 83 Ky. 57; *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156; *Gass v. Coblenz*, 43 Mo. 377; *Harriss v. Mabry*, 23 N. C. 240; *Purveyor v. Thompson*, 5 Humphr. (Tenn.) 397.

A master is civilly liable for the negligence of his servant committed in the course of his employment, and resulting in injury to a third person, whether the act constituting the negligence is actionable on common-law principles, or is made such by statute. *Osborne v. McMasters*, 40 Minn. 103, 41 N. W. 543, 12 Am. St. Rep. 698; *Potulni v. Saunders*, 37 Minn. 517, 35 N. W. 379; *Lakin v. Oregon, etc., R. Co.*, 15 Oreg. 220; *Texas, etc., Ry. Co. v. Davidson*, 68 Tex. 370; *Fick v. Chicago, etc., Ry. Co.*, 68 Wis. 469, 32 N. W. 527.

Negligence of drivers of horses.—It is negligence for which the master is responsible for his servant while intrusted by him with his team of high-spirited horses to leave them unhitched and uncared for by the side of a public highway. *Pierce v. Connors*, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279.

A driver who swings his team about and backs it up so that the body of the wagon projects over the sidewalk, causing injuries to a pedestrian on the walk, is guilty of negligence, rendering his employer liable. *Wolfe Mfg. Co. v. Wilson*, 46 Ill. App. 381, affirmed, 152 Ill. 9, 38 N. E. 694, 26 L. R. A. 229.

But under the Massachusetts statute directing as to the manner of the passage of teams on public highways, it was held that a master is not liable for the damages sustained by a party by reason of the omission of his servant seasonably to drive the master's vehicle to the right of the middle of the traveled part of the road when meeting another vehicle. *Goodhue v. Dix*, 2 Gray (Mass.), 181.

2. **RIGHT OF WAY.**— It is not the duty of the conductor or motorman to stop a street car for the purpose of permitting a vehicle traveling at right angles with the car to pass over the intersection first, when the car, by reason of its nearness to the point of intersection, has the right of way.
3. **INSTRUCTION AS TO INTOXICATION OF EMPLOYEES.**— An instruction to the effect that the jury in arriving at its verdict might consider "whatever the evidence may show as to whether or not the servants of the defendant were intoxicated, together with all other evidence in the case," is not objectionable as telling the jury that they might consider the evidence of such intoxication in fixing the amount of damages, since it does not appear from the record that any question of punitive or vindictive damages was suggested.

APPEAL by defendant from judgment of Appellate Court, affirming a judgment for the plaintiff. Decided December 16, 1903. Reported 206 Ill. 362, 69 N. E. 50.

Statement of facts by SCOTT, J.

This is an action on the case, brought by appellee in the Superior Court of Cook county to recover damages for a personal injury occasioned through the alleged negligence of appellant. A trial before a jury resulted in a verdict for \$2,000 in favor of appellee. Judgment was entered on the verdict, and an appeal was taken to the Appellate Court of the First District, where the judgment of the Superior Court was affirmed, and the case is now before this court on appeal from the Appellate Court.

Appellee received the injuries complained of in this suit on May 30, 1900, in the city of Chicago, while engaged in the performance of his duties as a street-car conductor for the Chicago Union Traction Company. The car was running west on North avenue, in that city, and when about 100 feet from Leavitt street, an intersecting street, the appellee rang a bell on the car as a signal to the motorman to stop at Leavitt street for the purpose of allowing passengers to get off the car. The car commenced to slacken speed. It had almost crossed the intersection of the streets, when an ice wagon belonging to the appellant, drawn by two horses, coming south on Leavitt street, ran into the car, and the pole of the wagon struck the plaintiff's leg with sufficient force to break it and seriously injure him. The car contained no aisle running lengthwise, and it was necessary for appellee, in performing his duties as conductor, to pass from one end of the car to the other along a footboard running outside the car its entire length, and provided for that purpose. Appellee, immediately prior to the time of receiving the injury, was on the north footboard of the car, with his face turned south, collecting fares. He testified that he heard the rumbling of a wagon, and, looking backward, saw the wagon, about twenty feet away, coming rapidly south on Leavitt street toward the car; that he tried to jump forward out of the way, but was struck just as he jumped. The evidence tends to show that

the horses were being driven so fast that the driver was unable to stop them in time to avert the injury; that, just before reaching Leavitt street, the motorman sounded a gong on the car to give warning of the approaching car, and that the car was moving slowly when struck by the wagon pole. The wagon weighed 3,700 pounds, and the ice it contained weighed 2,200 pounds. Three employees of appellant, one of whom was driving the horses, were in the wagon at the time it collided with the car, and the evidence tends to show that these employees were intoxicated.

Wilfred H. Card and Quinn O'Brien, for appellant.

Gemmill & Foell, for appellee.

Opinion by SCOTT, J.

Defendant below, at the conclusion of plaintiff's evidence, and again at the conclusion of all the evidence, moved the court to instruct the jury to return a verdict for the defendant. Both motions were overruled and appellant presents to this court, as a matter of law, the question whether the evidence sustaining the cause of the plaintiff below, with the reasonable inferences to be drawn therefrom, is sufficient to warrant a verdict for the plaintiff.

A considerable portion of appellant's brief and argument is devoted to establishing the fact that either appellee or the motorman could have seen the approaching wagon and stopped the car, and thereby avoided the accident. It may be conceded that this is true; but this fact does not in any way tend to show that appellant was not guilty of negligence, or that appellee was guilty of negligence. As the car approached the point where the line of travel it was following would intersect the line of travel the appellant's team was following it was traveling at a reasonable rate of speed, as shown by the evidence. Traveling at that rate of speed, it reached the intersection first. There was nothing to prevent appellant's driver seeing the car and perceiving that it would reach the point of intersection first. Under these circumstances it was the duty of the driver of the team, and not the duty of those in charge of the car, to stop; and the failure of the driver to stop his team under the circumstances is the negligence of appellant.

A large number of cases are cited in reference to the duty of those in charge of a street car to look ahead as they approach the street crossing, for the purpose of avoiding accidents to persons

or vehicles using the crossing. These are all cases where the street-car company has been made defendant, and have no application here. None of them go to the extent of holding that it is the duty of the conductor or motorman to stop a car for the purpose of permitting a vehicle traveling at right angles with the car to pass over the intersection first, when the car, by reason of its nearness to the point of intersection, has the right of way. The evidence tended to show that immediately preceding the collision the team of the appellant was traveling at a higher rate of speed than was the car. Those in charge of the car had the right, however, to assume that those in charge of the team would recognize the superior right of the car and stop the team before it ran into the car. The court properly refused the peremptory instruction to find for the defendant.

The only other error presented was the modification of appellant's ninth instruction. This instruction, as requested, read as follows: "The jury are instructed that the mere fact, if it is a fact, that the servants of the ice company were intoxicated, would not make the defendant liable, provided you believe from the evidence that at and just before the time of the accident said servants were using ordinary care in driving the team in question. And even though you should believe that said servants were intoxicated, you should find the defendant not guilty if you also believe from the evidence that the plaintiff himself failed to exercise reasonable care to prevent the accident, and that, if he had exercised such care, the accident would not have occurred." The court modified it by adding thereto the following: "But in arriving at your verdict you have a right to consider whatever the evidence may show as to whether or not the servants of the defendant were intoxicated, together with all the other evidence in the case." The objection made to this modification is that it tells the jury that in arriving at their verdict they may consider the evidence of intoxication. This is said to be too broad; that the instruction at least should do no more than advise the jury that in determining defendant's liability they had a right to consider the evidence on that subject, the reasons assigned being that determining the amount of damages to be allowed was a part of the process of arriving at a verdict, and that the jury were, there-

fore, improperly told that they might consider the evidence of intoxication of appellant's driver in fixing the amount of damages. If this were a case in which punitive damages had been claimed, we can see that this instruction might have this effect; but a careful examination of the record shows that it was tried by both sides on the theory that the jury could award to the plaintiff only the actual damages sustained by him. So far as appears from the record, the question of punitive or vindictive damages was not suggested in the course of the trial. We do not think, under these circumstances, that the jury would understand from this instruction, as modified, that they were authorized to increase the amount of their verdict if they found from the evidence that appellant's driver was intoxicated. While the consideration of the evidence on the subject of intoxication might well, by the language of the instruction, have been limited to the deliberations of the jury in determining defendant's liability, we do not think the jury, under the circumstances of this case, could have given it any weight in fixing the amount of their verdict.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

Chicago City Railway Co. v. Carroll.

(Illinois — Supreme Court.)

- 1. INJURY TO PASSENGER WHILE TRANSFERRING FROM ONE CAR TO ANOTHER; EVIDENCE OF POSSESSION OF TRANSFER.**¹—The plaintiff paid his fare as a passenger on one of the street cars of the defendant and received a transfer for use upon another line; as the plaintiff was alighting from the car to take another car of the defendant he was struck by a trolley pole falling from the car, causing the injuries complained of. It appeared that the plaintiff's son found a transfer paper in his pocket when he was brought to his home. Such paper was not offered in evidence, but it was not denied that he had the transfer or that he received it in the regular way. It was held that the evidence was sufficient to show that the plaintiff had received a transfer and was a passenger at the time of the injury.

1. Possession of transfer slip as evidence of status of passenger.—The general rule is that the previous purchase of a ticket is not essential to the beginning of the relation of passenger and carrier, where it is not by the rules

2. **PRESUMPTION OF NEGLIGENCE FROM FALL OF TROLLEY POLE.**—It was not necessary for the plaintiff to show what caused the trolley pole to fall. Proof being made that the plaintiff was injured while a passenger, the burden of explaining how the injury occurred and of rebutting the presumption of negligence is upon the defendant.
3. **SPECIFIC ALLEGATIONS OF NEGLIGENCE.**—Where three of six counts in a declaration allege general negligence, the fact that the other three allege specific negligence does not make it incumbent upon the plaintiff to produce evidence substantiating such specific charges, nor relieve the defendant from its burden of rebutting the presumption of negligence.

APPEAL by defendant from judgment in favor of plaintiff. Decided December 16, 1903. Reported 206 Ill. 318, 68 N. E. 1087.

Statement of facts by RICKS, J.

This is an appeal from the Appellate Court for the First District from a judgment obtained by Robert Carroll against the Chicago City Railway Company. The original judgment in the Superior Court was for the sum of

or known usage of the company made a condition precedent to the acceptance of the passenger. 6 Cyc. 537; Nellis Street Railroad Accident Law, p. 40. The relation commences, in the case of a street railway company, when a person places himself, in good faith and with the intention of taking passage, in a situation to avail himself of the facilities for transportation which the company offers. Nellis Street Railroad Accident Law, p. 44. The relation continues until the passenger has had a reasonable opportunity to leave the car at the place where his journey ends. A temporary departure from the car for a legitimate purpose without the intent to abandon the transportation does not end the relation. *Atlanta Consol. St. R. Co. v. Bates*, 103 Ga. 333, 30 S. E. 41; *Brunswick, etc., R. Co. v. Moore*, 101 Ga. 684, 28 S. E. 1000; *Conroy v. Chicago, etc., R. Co.*, 96 Wis. 243, 70 N. W. 486, 38 L. R. A. 419.

Where a transfer slip is given to a passenger entitling him to transfer from the car on which he paid his fare to another car running on a line connecting with the line on which he is traveling, his status as a passenger continues without change until he reaches his destination on the line to which he is transferred. If he is injured by the negligence of the company at a point where he is required to make the transfer the liability of the company is based upon the relationship of a carrier and passenger. *Citizens' St. Ry. Co. v. Merl*, 134 Ind. 609, 33 N. E. 1014.

In the case of *Keator v. Scranton Traction Co.*, 191 Pa. St. 102, 43 Atl. 86, 71 Am. St. Rep. 758, 44 L. R. A. 546, it was held that if a passenger is given a transfer ticket from one electric car to another, to enable him to reach his destination, and, while in the highway, approaching and near to the proper car for him to take under the terms of the transfer, he is struck by a piece of the trolley pole, which breaks while it is being turned from one end of the car to the other, and while the company or its servant is not exercising extraordinary care toward the holder of the transfer, he is entitled, as a passenger, to recover for the injury thus sustained.

\$5,000. The Appellate Court required a remittitur of \$2,000, and judgment was entered for the sum of \$3,000. The declaration consisted of six counts. Each of said counts alleged that defendant was possessed of, owning, and operating a street railway, and electric street cars thereon, the electricity for which was supplied from the wire overhead through and upon an iron trolley pole attached to the top of the car. Each count contained averments of due care and caution. The first count alleges, also, that plaintiff was at or near the intersection of Wentworth avenue and Thirty-fifth street, and, without alleging any duty, avers that the defendant, by its servants, so carelessly and negligently propelled and managed its car and trolley pole that the pole broke away from said car, fell, and hit plaintiff upon the head. The second count avers defendant also owned and operated tracks and trolley wires on Thirty-fifth street, and that it was defendant's duty, when crossing said street, to manage and control the trolley pole on the Wentworth avenue car by a rope attached thereto, so that it should not be caught in the intersecting wires; that while the plaintiff was walking along Wentworth avenue, at or near the intersection of Thirty-fifth street, defendant, by its servants, so carelessly and negligently managed and operated said car and trolley pole that the upper end thereof was not held in control, and became caught and entangled in said wires, and was thereby torn off the roof of said car, fell, etc. The third count alleges that the trolley pole was connected to the car by a turntable attached or screwed to the car by a bolt, and that it was defendant's duty to provide strong and sufficient bolts; that the pole and turntable were attached by an insufficient and defective bolt; that while plaintiff was walking along Wentworth avenue, at or near its intersection with Thirty-fifth street, said pole fell by reason of said defective bolt. The fourth count alleges that it was defendant's duty to regularly inspect the pole and turntable, and see that the bolts and screws were in good order and repair; that defendant permitted said bolts and screws by which the turn-

Presumption of negligence.—See as to presumption of negligence where a passenger of a street railway company is injured, *Nellis Street Railroad Accident Law*, pp. 570-583; and the following cases reported in this series: *Leveret v. Shreveport Belt Line Co.*, 1 St. Ry. Rep. 253, 34 So. 579; *Leslie v. Jackson & Sub. Tract. Co.*, 1 St. Ry. Rep. 409, 96 N. W. 580; *Bosworth v. Union Ry. Co.*, 1 St. Ry. Rep. 757; *Cassady v. Old Colony St. Ry. Co.*, 1 St. Ry. Rep. 330, 68 N. E. 10; *Robinson v. St. Louis & Sub. Ry. Co.*, 2 St. Ry. Rep. 630, (Mo. App.) 77 S. W. 493; *Palmer v. Warren St. Ry. Co.*, 2 St. Ry. Rep. 839, (Pa. St.) 56 Atl. 49; *Jones v. United Rys. & Elec. Co.*, 2 St. Ry. Rep. 406, (Md.) 57 Atl. 620; *Heyde v. St. Louis Transit Co.*, 2 St. Ry. Rep. 630, (Mo. App.) 77 S. W. 127; *Doolin v. Omnibus Cable Co.*, 2 St. Ry. Rep. 18, 73 Pac. 1060; *Cummings v. Wichita R. R. & L. Co.*, 2 St. Ry. Rep. 278, (Kan.) 74 Pac. 1104; *Powell v. Hudson Valley Ry. Co.*, 2 St. Ry. Rep. 800, 88 App. Div. (N. Y.) 133, 84 N. Y. Supp. 337; *Klinger v. United Traction Co.*, 2 St. Ry. Rep. 799, 92 App. Div. (N. Y.) 100, 87 N. Y. Supp. 864; *Aston v. St. Louis Transit Co.*, 2 St. Ry. Rep. 631, (Mo. App.) 79 S. W. 999.

table and pole were attached to the car to become worn out, rusty, and out of repair; and that while plaintiff was walking along Wentworth avenue, at or near the intersection of Thirty-fifth street, the trolley pole fell by reason of the defective bolt, as aforesaid. The fifth count charges that defendant operated both the Thirty-fifth street and Wentworth avenue lines, and that passengers were entitled, for one fare, to a continuous ride on both streets, and were given transfer slips entitling them to change cars at Thirty-fifth street; that plaintiff was a passenger upon a Wentworth avenue car, paid his fare, and received a transfer slip; that he left the Wentworth avenue car at or near the intersection with Thirty-fifth street to continue his journey upon a Thirty-fifth street car, and, while he was walking to said car, defendant so carelessly and negligently managed and operated the Wentworth avenue car, and trolley pole attached thereto, that said trolley pole fell, etc. The sixth count differs from the fifth count in the negligence averred, which is that defendant, by its servants, carelessly and negligently permitted plaintiff to be hit upon the head by said trolley pole. The general issue, only, was filed. The only error relied upon is that the Appellate Court erred in affirming the judgment of the Superior Court, and in not reversing the same; and, based upon this assignment, appellant argues and insists upon error in the court's refusal to direct a verdict for appellant, and in failing to direct the jury that appellee could not recover under the various counts of the declaration, the giving and refusal of instructions, the admission and rejection of evidence, and alleged improper remarks by the court.

Wm. J. Hynes and Samuel S. Page (Mason B. Starring, of counsel), for appellant.

Steere & Furber, for appellee.

Opinion by RICKS, J.

At the close of all the evidence appellant made a motion and offered an instruction to have a verdict directed for it. The court denied the motion and refused the instruction, and for that, error is assigned. If there was evidence in the record fairly tending to support the averments of the declaration, or any count of it, that instruction was properly refused.

As to the manner in which and the circumstances under which appellee received his injuries, no evidence was offered except by appellee. Appellant has no evidence in the record, and examined no witnesses on any branch of the case, except as to the measure of damages, so that whatever evidence there is in the

record tending to establish appellee's case is uncontradicted and undisputed. The undisputed evidence shows that appellee, on the 28th day of January, 1899, between 10 and 11 o'clock, A. M., entered one of appellant's electric cars, which was operated by a trolley, at Sixty-third street and Wentworth avenue, to make a journey over its line thence to Thirty-fifth street, where appellant had a line running east and west along the latter street, which appellee was to take to carry him west to Parnell avenue, where he resided; that appellee paid his fare, and received a transfer for the Thirty-fifth street line; that when Thirty-fifth street was reached, and as appellee was alighting from, or just as he had alighted from, the Wentworth avenue car to go to the Thirty-fifth street car, at the junction of these two streets, the trolley pole from the Wentworth avenue car, from which appellee had just alighted or was alighting, fell from that car and struck appellee upon the head and knocked him down, and whatever injuries he did suffer resulted therefrom. Appellee was picked up in a dazed condition, and carried to a store near the car line, and taken thence home in an ambulance.

Appellee testified that he had a transfer, and his son testified that when he was brought home a transfer was taken out of his pocket. No witness denied that he had a transfer, or that he received it in the regular way. It is now urged that because a transfer paper itself was not offered in evidence, and is not in the record, that is fatal to appellee's case. We do not think so. The action was not upon the transfer paper. It was a mere incident to appellee's right. It was sufficient that the undisputed evidence showed, or tended to show, that appellee did receive a transfer, and in consequence of that, and by virtue of it, was a passenger on both lines of appellant while making a continuous journey to his destination. *North Chicago Street R. Co. v. Kaspers*, 186 Ill. 246, 57 N. E. 849.

It is further said by appellant that there is nothing to show what caused the trolley pole to fall, or to show that the car was run in a negligent manner with regard to speed, or defectively or wrongly constructed. It was not necessary for appellee to show these matters. As early as 1854, in the case of *Galena & Chicago*

Union R. Co. v. Yarwood, 15 Ill. 468, this rule was announced (page 471) :

"By the law they [railroads] are bound to the utmost diligence and care, and are liable for slight negligence. Proof that defendant [appellee] was a passenger, the accident, and the injury, make a *prima facie* case of negligence. This is done, and the burden of explaining is thrown upon the plaintiffs [appellants]."

The rule above quoted has, from the time of its announcement to the present time, been adhered to by an unbroken line of decisions in this State. It is the general, recognized rule of this country, and is one application of the rule *res ipsa loquitur*. 3 Thomp. Neg., § 2754; 2 Whart. Neg., § 661; *Galena & Chicago Union R. Co. v. Yarwood*, 17 Ill. 509, 65 Am. Dec. 682; *Pittsburg, Cincinnati & St. Louis Ry. Co. v. Thompson*, 56 Ill. 138; *Peoria, Pekin & Jacksonville R. Co. v. Reynolds*, 88 Ill. 418; *Eagle Packet Co. v. Defries*, 94 Ill. 598, 34 Am. Rep. 245; *North Chicago Street Ry. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899. The rule as announced by Mr. Thompson in his work on Negligence, *supra*, is:

"The general rule may be said to be that where an injury happens to the passenger in consequence of the breaking or failure of the vehicle, roadway, or other appliance owned or controlled by the carrier, and used by him in making the transit, or in consequence of the act, omission, or mistake of his servants, the person entitled to sue for the injury makes out a *prima facie* case for damages against the carrier by proving the contract of carriage; that the accident happened in consequence of such breaking or failure, or such act, omission, or mistake of his servants; and that in consequence of the accident the plaintiff sustained damage."

In *North Chicago Street Ry. Co. v. Cotton*, *supra*, this court said (page 494, 140 Ill., page 901, 29 N. E.):

"The general rule seems to be that proof of an injury occurring as the proximate result of an act which under ordinary circumstances would not, if done with due care, have injured any one, is enough to make out a presumption of negligence. And this is held to be the rule even where no special relation, like that of passenger and carrier, exists between the parties."

In that case the further language is used (page 493, 140 Ill., page 901, 29 N. E.):

"The evidence of the injury to the plaintiff, and the circumstances under which it was inflicted, were, alone, sufficient to raise a presumption of negligence on the part of the defendant; and, as no evidence was offered to rebut that presumption, a verdict in favor of the plaintiff necessarily followed, wholly regardless of the evidence objected to."

Appellant contends that as certain counts in the declaration alleged that the car was not properly inspected, and that other counts alleged that the bolts and connections of the trolley pole were rusty and worn, these were specific charges of negligence, and there was no proof in the record to support them. Appellant, in its argument, seems to overlook the fact that the declaration contained six counts, and that in at least three of them there was no specific negligence charged. But if its contention was sound, as we think it is not, as applied to the counts charging specific negligence, it could not be applied to the counts charging general negligence. Touching this same objection, which was made in the Cotton case, *supra*, this court said (page 495, 140 Ill., page 901, 29 N. E.): "But it seems to be contended that, even admitting that a presumption of negligence arises from mere proof of the plaintiff's injury and its cause, it does not follow that there is any presumption of the specific negligence alleged in the declaration. Even if it be admitted that the presumption is one of negligence generally, and not of any specific negligence, we think it sufficient to throw upon the defendant the burden of rebutting the specific negligence alleged. But the circumstances of the injury do, in our opinion, give presumptive evidence of at least the specific negligence charged in the first count of the declaration. That charge, as we have seen, is very general, and consists of negligently running and operating its road and the cars propelled thereon." The first count of the declaration charges that appellant "so carelessly and negligently propelled and managed said car and trolley pole that said trolley pole broke away from said car, and fell and hit plaintiff upon the head." The fifth count charges that appellant "so carelessly and negligently managed and operated said Wentworth

avenue car, and trolley pole attached thereto, that said trolley pole fell and hit plaintiff upon the head." The sixth or additional count charges that appellant "carelessly permitted plaintiff to be hit upon the head by said trolley pole." Applying the rule as announced in the above case, and as we think it is generally recognized, there can be no doubt but that the evidence in behalf of appellee was sufficient to cast upon appellant the burden of rebutting the negligence alleged in these counts.

Appellant says that, even if it be conceded that the rule *res ipsa* applies, the instruction should have been given, because there was no evidence in the record showing that appellant owned, operated, or controlled the electric car lines in question. There was evidence in the record tending to show that appellant did operate and own the lines in question. Appellee's son testified that the cars running upon the Wentworth avenue line bore the inscription, "The Chicago City Railway." Dr. Babcock, a witness for appellant, testified that on the same day that appellee was injured, and very shortly after the injury, he was directed by appellant to go and make an examination of appellee, and was paid by the appellant for that service. Dr. Moyer, another witness for appellant, testified that he examined appellee on the morning of February 3, 1899, and that he was sent by the appellant to make the examination, and appellant paid for it. Dr. John Leeming testified that he examined appellee on August 4, 1899; that he was sent by appellant to make the examination, and was paid by it for so doing. *Consolidated Coal Co. v. Bruce*, 150 Ill. 449, 37 N. E. 912. Every count in the declaration averred that appellant was possessed of, owned, and operated said electric railroad. In *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362, it was said that the plea of the general issue did not traverse the allegation that the defendant was possessed of and operated a railroad, and appellee invokes this case as authority for the position, that it was unnecessary for it to make any proof of that allegation until it was denied. As there was evidence in the record tending to show ownership and operation of this railroad by appellant, the case does not need to be disposed of upon the theory of the presumption arising from the pleadings. The case does not present that question squarely, and we do not

now feel called upon to determine just what construction shall be placed upon the language of the court in the Lockridge case. We are clear, however, that where the matter is not made an issue, and is but inducement to the general charge of negligence averred, slight evidence will be sufficient, uncontradicted, to support the allegation.

Appellant, at the close of all the evidence, also offered six instructions asking the court to hold that appellee could not recover under the respective counts of his declaration. The ground of the contention is not stated in the instructions offered, and, if it were upon the theory that there was a variance between the declaration and the evidence, the instruction should have been denied, for the failure to point out wherein there was a variance, so that it might be obviated by proper amendment. *Chicago, Rock Island & Pacific Ry. Co. v. Clough*, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184. The theory of appellant as to these instructions seems to be that there was no evidence, or not sufficient evidence, to support any count in the declaration. From what we have already said, it is quite clear that as to at least three counts the instructions were properly refused; and, though there may have been counts that there was no proof to sustain, they were all for the same injury, and any one good count would have been sufficient to support a verdict and judgment. It has not been, and cannot well be, as we think, pointed out, how appellant could be injured by the refusal of these instructions as to particular counts, when other counts must have been permitted to stand to evidence applying to them, and we would not reverse the case for such error if it existed.

It is urged that it was error, on cross-examination, to ask the doctors introduced by appellant by whom they were sent and paid. We do not think so. It is always competent, on cross-examination, to ask a witness if he is in the employ of a party, or if at the time he rendered the particular service he was in the employ of such party, for the purpose of showing his relation to the case, and his interest in it, as affecting his credibility and weight of his evidence. It being proper to ask the question, and the evidence being properly in the record, it could be considered on any proposition it tended to establish.

It is also complained that appellee had closed his case, and appellant had offered its evidence, when appellee was allowed to recall his son John, and show by him the name or the inscription on the cars on appellant's line. This was not error. It is in the discretion of the trial court to allow evidence that has been overlooked or omitted, at any stage of the case; and unless that discretion has been abused, or injury is shown to have resulted from it, it cannot be said to be error. When this son of appellee was recalled, and allowed to testify relative to the name appearing on the cars, the court informed appellant that, if it so desired, he would hear evidence on its part in denial of what the evidence thus allowed tended to show, but appellant offered no such evidence.

When this witness retired from the stand, appellee announced that he rested his case. Appellant's attorney then said: "We desire to offer evidence, your honor, on the question of inspection of the cars, and so forth." The court replied: "Very well. I won't receive any evidence, except as to the ownership of this line, at this stage." Exception was taken, and it is now urged that, inasmuch as appellee was allowed to show the inscription on the cars, it tended to show ownership, and that appellant should have been allowed to show that it did inspect its cars; that, in the absence of proof of ownership, appellant was not required to prove anything; and that as there was no evidence, until the testimony of his son, of ownership, the court should have opened the case, and allowed proof upon the question of inspection. It may first be said, there was evidence of ownership and operation of the car by appellant already in the record, and it would be a dangerous rule of practice to sustain error upon an assignment such as this. Appellant, in fact, offered no evidence upon the matter. No witness was put upon the stand. No question was asked. Nothing was done, except a mere conversation or talk had between counsel for appellant and the court. Such procedure as that does not amount to an offer of evidence, and the remarks of the court did not amount to a refusal to admit evidence. There can be no refusal to admit that which has not been offered, and counsel cannot, by engaging in a mere conversation with the court, although it may relate to the procedure,

by merely stating what he desires to do, get a ruling from the court upon which he can predicate error. If appellant desired to make the contention it now makes, it should have at least put a witness upon the stand, and proceeded far enough that the question relative to the point it is now said it was desired to offer evidence upon was reached, and then put the question, and allow the court to rule upon it, and then offer what was expected to be proved by the witness, if he was not allowed to answer the question asked. It was not stated to the court that appellant did inspect the cars, or could prove that the cars had been regularly inspected or recently inspected, or that the inspection that was made was an examination of the trolley pole or its attachments; and to now hold that the case should be reversed upon the mere statement of counsel that he desired to offer evidence upon the question of the "inspection of the cars, and so forth," would, as we think, be setting a dangerous precedent, and one that would tend to irregularity in such matters. *Stevens v. Newman*, 68 Ill. App. 549; *Beard v. Lofton*, 102 Ind. 408, 2 N. E. 129; *Morris v. Morris*, 119 Ind. 341, 21 N. E. 918; *Ralston v. Moore*, 105 Ill. 243, 4 N. E. 673; *Smith v. Gorham*, 119 Ind. 436, 21 N. E. 1096; *City of Evansville v. Thacker*, 2 Ind. App. 370, 28 N. E. 559; *Darnell v. Sallee*, 7 Ind. App. 581, 34 N. E. 1020; *First Nat. Bank v. Stanley*, 4 Ind. App. 213, 30 N. E. 799; *Lewis v. State*, 4 Ind. App. 504, 31 N. E. 375; *Huggins v. Hughes*, 11 Ind. App. 465, 39 N. E. 298; 8 Encyc. of Pl. & Pr. 236.

Other matters are urged by appellant with reference to the admission and exclusion of evidence, which relate particularly to the examination of the medical witnesses and experts. The objections grow chiefly out of hypothetical questions propounded to witnesses relative to the condition of appellee. The questions are long, and the objection highly technical. We have examined the questions in the light of appellant's argument, and think there was no material error in the ruling of the court in regard to them. One of the matters of evidence objected to is that appellee was allowed to testify as to his wages and earnings previous to the time of the injury, while there is no allegation in the declaration, or any count thereof, that appellee lost any specific wages or earnings, and no allegation of any particular trade or profession.

The evidence was that appellee was a carpenter and contractor, and in relation to the wages he received in such lines of business. In *Chicago & Erie R. Co. v. Meech*, 163 Ill. 305, 45 N. E. 290, this question was very fully considered, and after a review of the cases of an earlier day, when this court had authority to review both the facts and the law, we said (page 314, 163 Ill., page 293, 45 N. E.):

"The rule deducible from the cases in this State is that, in order to recover compensation for inability to work at the plaintiff's ordinary and usual employment or business, all that is necessary in the declaration is the general averment of such inability caused by the injury, and consequent loss and damage, and that proof of his particular employment or business, and of his ordinary wages or earnings therein, is admissible in evidence under such general averment, but that, when it is sought to recover for loss of profits or earnings that depend upon the performance of a special contract or engagement, then these special and particular damages, and the facts on which they are based, must be set out in the declaration."

The evidence did not go to any special or particular damage growing out of the performance of any special contract or engagement which the appellee claimed to have lost, but related solely to his earning capacity as a carpenter and foreman. It did not go into the question of his future or past profits and contracts, and there was no error in its admission.

It is also assigned as error that the court made improper remarks during the progress of the trial. This assignment we cannot consider. An examination both of the abstract and record discloses that no objection or exception was taken at the time. In *Hall v. First Nat. Bank of Emporia*, 133 Ill. 234, 24 N. E. 546, we said (page 243, 133 Ill., page 548, 24 N. E.):

"Various objections are made to the conduct of the trial judge. It is enough to say that no exceptions appear to have been taken in respect of such conduct. If the trial judge was guilty of impropriety, * * * the party objecting must, by objection and exception, properly preserve the same in the record, if he desires to insist upon the same upon error or appeal."

The same rule is recognized and laid down in 8 Encyclopedia of Pleading and Practice, 272.

Five instructions were given in behalf of appellee, and all are complained of. The first instruction told the jury that, if plain-

tiff had proved his cause of action as alleged in his declaration, he was entitled to a verdict. This instruction has several times been before this court, and has been held to be unobjectionable. *Pennsylvania Co. v. Marshall*, 119 Ill. 399, 10 N. E. 220; *Chicago City Ry. Co. v. Hastings*, 136 Ill. 251, 26 N. E. 594; *Ohio & Mississippi Ry. Co. v. Porter*, 92 Ill. 437; *Race v. Oldridge*, 90 Ill. 250, 32 Am. Rep. 27; *Mt. Olive Coal Co. v. Rademacher*, 190 Ill. 538, 60 N. E. 888.

It is complained that the second instruction assumes that the appellant was the owner of the street railroads mentioned in the declaration. We do not think the instruction assumes anything, but tells the jury that if they believe, from the evidence, the matters stated in the instruction, they shall find for the plaintiff. But if the appellant's construction of the instruction were correct, it would not for that reason alone be error. There was a *prima facie* showing by appellee that appellant owned and operated the railroad which injured appellee, and there was no evidence even tending to contradict it; and it is not error for the court to assume in an instruction that which is established on one side, and not denied on the other.

Appellee's third instruction told the jury that if they found, from the evidence, he was a passenger of appellant, and was struck and injured by the trolley pole falling from appellant's car, and that appellee was using due care, then the burden was upon appellant to show that "it did all that human care, vigilance, and foresight could reasonably do, consistent with the character and mode of conveyance adopted, in the practical prosecution of its business, to prevent accident and injuries to passengers riding upon its cars, or alighting therefrom and leaving the same." It is said this instruction was in conflict with other instructions given for appellant, namely, the sixth, which was that appellee must prove that appellant owned and operated the car in question; the twenty-third, which was that appellant should exercise such care "as human beings are capable of, and such care as is consistent with the practical operation of its trains;" and the thirty-fifth, which was that a party charging negligence must prove it. We see no conflict. The rule of care is the same in appellee's third and appellant's twenty-third instructions, and,

as there were several counts in the declaration, some of which were not upon the relation of carrier and passenger, appellant's thirty-fifth instruction was properly given; but when the relation of carrier and passenger was established, and the injury shown to have resulted from instruments and means wholly within appellant's control, then, *prima facie*, the negligence of appellant was proven. To establish that the relation of carrier and passenger existed, it would naturally follow that it must be shown in some manner, either by admission or evidence, that appellant owned and operated the car in question, and that appellee was a passenger, by having ridden, by being in the car, or in some of the ways by which that relation may arise.

Appellee's fourth instruction is as to the measure of damages, and appellant complains that "it includes the element of prospective suffering and loss of health." The declaration, and at least two of the counts, allege permanent injury, and it was not error to instruct the jury to compensate appellee for not only what he had suffered, but what he would suffer.

It is said the fifth instruction given by the court *sua sponte* did not require the jury to find, from the evidence, the matters submitted, and it required of appellant a higher degree of care than it should. The instruction submits a number of matters of fact to the jury, and correctly states the rule applicable, and concludes with a sentence beginning, "What is the truth, the jury must determine from the evidence only." We do not regard the instruction as bad, from any point of view. It does not state fully the rule as to the care required of appellant, but that is cured by other instructions, and particularly by appellant's twenty-third, which deals with that sole question.

Appellant offered forty-two instructions, and thirty-one were given by the court. It complains that all were not given. We have examined them, and many of them were bad, and should have been refused for that reason. Others are covered by those given, and there was no error in refusing them. Appellant was treated more liberally than was its right in the matter of instructions, and the substantial errors were in its favor, and at its request. The case required no such number, and covered no such

field, and we are satisfied appellant has suffered no injustice from the court in that regard.

Appellant has filed no brief in this case, but has filed an argument consisting of fifty-four pages, most of which is devoted to propositions which we are not authorized to consider in reviewing a case brought from the Appellate Court. For instance, it is urged that appellee is a malingerer, and that he was feigning much of the ailments and injuries to which he testified, and that the verdict is excessive, and that it is contrary to the evidence. All of these matters were disposed of before this case reached this court. Unless the court has the aid of counsel in pointing out the particular defects, and the law relating to the matter, from the view point of counsel urging objections, it cannot be expected to go through both the record and the whole field of the law to ascertain if some rule may not be applied that will be beneficial to the objector. The rules of this court require a brief, and permit an argument; and the tendency of counsel is to too frequently avail themselves of that which is permissive, and ignore that which is required.

As we view this record, the judgments of the trial and appellate courts should be sustained. The judgment of the Appellate Court is affirmed. Judgment affirmed.

Chicago Union Traction Co. v. Browdy.

(Illinois — Supreme Court.)

1. COLLISION WITH VEHICLE DRIVEN ON TRACK IN FRONT OF CAR.¹— Where a person drives a horse and wagon in front of a street car so near the car that it cannot be stopped by the motorman in time to avoid a collision, the street railway company is not liable for the injury.

1. Collision with vehicle suddenly driven on track.— Cases frequently arise where the plaintiff's injuries resulted from the sudden driving of a vehicle from a place of safety onto the defendant's street car tracks in such a manner and under such circumstances as to prevent the taking of such action as will avoid the collision. The rule is general, supported by a long line of authorities, that the motorman in charge of an electric car running in a public street is bound to notice what vehicles ahead of him and near the track are doing,

2. INSTRUCTION AS TO DUTY OF MOTORMAN TO AVOID INJURY.—An instruction to the effect that if the jury find that the plaintiff suddenly and unexpectedly and without the knowledge of the defendant, drove his wagon across and upon the defendant's track, thereby placing himself in a position of danger, then, in order to charge the defendant with the duty to avoid the injury, the plaintiff must show by a preponderance of evidence that the defendant's servants had an opportunity to avoid the injury; that if the jury believe that the defendant and its servants did not have a reasonable opportunity in the exercise of ordinary care to avoid such injury, then they should find the defendant not guilty; that if the jury believe that the plaintiff suddenly and unexpectedly drove across and upon the track in front of the car, and that the servants in charge of the car did all that could be done in the exercise of ordinary care to avoid the injury, then the plaintiff cannot recover, was held to be a correct statement of the law. The evidence was considered and held sufficient to justify such an instruction.

APPEAL by defendant from a judgment for the plaintiff. Decided December 16, 1903. Reported 206 Ill. 615, 69 N. E. 570.

John A. Rose and *Louis Boisot* (W. W. Gurley, of counsel),
for appellant.

Waters & Johnson, for appellee.

Opinion by HAND, C. J.

This is an action on the case brought by the appellee against the appellant, in the Superior Court of Cook county, to recover

and if he sees one going on the track or crossing the track immediately or a short distance in front of the car, or going so near to the track as to be in danger of being struck by his car, to warn the driver of such vehicle, and, so far as he is able, to arrest the progress of his car, and if necessary stop it for the purpose of preventing a collision, irrespective of the question whether or not the driver of the vehicle is guilty of contributory negligence. See *Nellis Street Railroad Accident Law*, pp. 304, 305, and cases there cited. But if it appear from the facts and circumstances of each particular case that the vehicle came so suddenly upon the tracks in front of the car that in the exercise of reasonable and ordinary care the motorman could not avoid the collision, the street railway company cannot be charged with negligence. For instance, if a motorman see a person driving along the street parallel to the track as though he had no intention of crossing it, the motorman is not guilty of negligence because he did not anticipate that such person would suddenly turn across the track in the middle of a block. *Davidson v. Denver Tramway Co.*, 4 Colo. App. 283, 35 Pac. 920; *Christensen v. Union Trunk Line*, 6 Wash.

damages for a personal injury. The declaration contained one count, and alleged that on July 15, 1900, the plaintiff was riding in a wagon drawn by one horse, along Twelfth street, in the city

75, 32 Pac. 1018. The motorman is not bound to apprehend that a vehicle proceeding on a line parallel to a track and at a safe distance from him will, other than at a crossing or in the immediate vicinity of one, diverge from its course and go on the track or so near to it as to be struck by his car. *South Chicago City Ry. Co. v. Kinnare*, 96 Ill. App. 210; *Knoll v. Third Ave. R. Co.*, 46 App. Div. (N. Y.) 527, 62 N. Y. Supp. 16, affirmed, 168 N. Y. 592. Nor is a street car company liable for personal injuries to a driver due to the fact that his horse suddenly and without warning sprang across the track in front of a car, making a collision unavoidable. *McManigal v. South Side Pass. R. Co.*, 181 Pa. St. 358, 37 Atl. 516. Nor where the injury was caused by the sudden backing of a wagon by a horse left unhitched in a city street, upon a track in front of an approaching car. *Higgins v. Wilmington City R. Co.*, 1 Marv. (Del.) 352, 41 Atl. 86; *McCambley v. Staten Island M. R. Co.*, 32 App. Div. (N. Y.) 346, 52 N. Y. Supp. 849; *Hoffman v. Syracuse Rapid Transit Ry. Co.*, 50 App. Div. (N. Y.) 83, 63 N. Y. Supp. 442. See also *Coughtry v. Willamette Ry. Co.*, 21 Oreg. 245, 27 Pac. 1031; *Gilmore v. Federal St., etc., R. Co.*, 153 Pa. St. 31, 25 Atl. 651; *Philadelphia Traction Co. v. Bernheimer*, 125 Pa. St. 615, 17 Atl. 477.

The motorman of an electric car is not negligent in failing to stop his car on seeing a runaway horse approaching the track, where he had but a brief time to decide upon the proper course, and he could not stop the car after seeing the horse until it reached the middle of the street. *Phillips v. People's Pass. R. Co.*, 190 Pa. St. 222, 42 Atl. 686. Nor is a motorman chargeable with negligence in colliding with a buggy when it was, without warning, turned upon the track thirty or forty feet in front of the car, and the motorman immediately exercised all the means in his power to stop the car, but was unable to do so before the collision. *Kissler v. Citizens' St. R. Co.*, 20 Ind. App. 427, 50 N. E. 891. Nor is a street railway company liable for injuries to one who, having halted his team at a crossing to allow a car to pass, suddenly attempted to cross in front of a rapidly approaching car, in plain view and distant not more than 225 feet, when the motorman vainly endeavored to arrest its speed. *Hemmingway v. New Orleans, etc., R. Co.*, 50 La. Ann. 1087, 23 So. 952.

An unexpected and sudden attempt by a person in a covered wagon to cross the track of a street railroad when a motor car was so close behind that only a few seconds elapsed before a collision does not present a question for the jury, notwithstanding one witness testifies that he thinks the motor could have been stopped before striking the wagon. *Fritz v. Detroit Citizens' St. R. Co.*, 105 Mich. 50, 5 Am. Electl. Cas. 480, 62 N. W. 1007.

Proper care in avoiding collision.—As to liability of street car company for failure of motorman to exercise proper care in avoiding collision see note to *Harrington v. Los Angeles Ry. Co.*, *ante*, p. 23, in which many cases are cited, including all those reported in this series.

of Chicago, and that the defendant, by its servants, so carelessly, negligently, and improperly drove and managed a certain motor car then running on Twelfth street that said car ran against said wagon, whereby the plaintiff was injured. The general issue was pleaded; and a trial before the court and a jury resulted in a verdict and judgment for \$2,500 in favor of appellee, which has been affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

It appears from the evidence that the accident occurred on the afternoon of Sunday, July 15, 1900; that the appellee, who was in the candy business, used a one-horse covered wagon with which to deliver his goods; that he left the horse and wagon standing near the curb upon the south side of Twelfth street, in front of the store of a customer, upon which street the appellant operated a double-track street railway; that after supplying his customer he got into his wagon and started to the place of business of another customer on the north side of the street, and a little east of the place where his horse and wagon had been standing; that he drove east on the south track of appellant a few feet, and then turned north across the tracks; that, just as he turned, the rear of his wagon was struck upon the south track by an east-bound motor car, to which was attached a trailer. The appellee testified that he did not see the car when he got into the wagon; that before he got into the wagon he saw the car standing on the southwest corner of Halsted and Twelfth streets, which point, the evidence shows, was in the neighborhood of 200 feet west of where the horse and wagon were standing. He further testified that he drove upon the south track, went east ten or fifteen feet, and then turned north, when the car struck the rear of the wagon and capsized it.

The appellant requested the court to give to the jury the following instruction, which request was refused:

"The court instructs the jury that if they believe from the evidence in the case that, while the defendant and its servants were (if they were) exercising ordinary care, the plaintiff, at the time and place of the injury, suddenly and unexpectedly, and without the knowledge of the defendant, drove his wagon across and upon defendant's track, and thereby placed himself in a position

of danger, then, in order to charge the defendant with the duty to avoid injuring him, the plaintiff must show, by a preponderance of the evidence in the case, that the circumstances were of such character that the defendant's servant or servants had an opportunity to become conscious of the facts giving rise to such duty, and a reasonable opportunity, in the exercise of ordinary care and caution, to perform such duty. And if the jury further believe from the evidence that the facts as shown by the evidence did not charge the defendant and its servants with the duty as thus defined, or if the jury believe from the evidence that the defendant and its servants did not have a reasonable opportunity, in the exercise of ordinary care, to perform such duty as thus defined, then they should find the defendant not guilty. And if the jury believe from the evidence in the case that the plaintiff suddenly and unexpectedly drove his wagon across and upon the track, in front of the car of the defendant which occasioned the injury, and that the servant or servants in charge of such car did all that could be done, in the exercise of ordinary care, to avoid injuring and damaging him, then the plaintiff cannot recover in this case, and the jury should find the defendant not guilty."

The theory of the appellant was that the appellee, without notice to the motorman, suddenly drove upon the track directly in front of an approaching car, and that the motorman did not have time, after the appellee drove upon the track, to stop the car before the same came in contact with the wagon of the appellee; and it is contended that the instruction properly stated the law applicable to such state of case, and that it was error for the court to refuse to give such instruction to the jury. The law seems to be well settled that, where the alleged negligence of a servant consists of an omission of duty suddenly and unexpectedly arising, it is incumbent on the plaintiff to show that the circumstances were such that the servant of defendant had an opportunity to become conscious of the facts giving rise to the duty, and a reasonable opportunity to perform it, before the master can be held liable. *Booth Street Railways*, § 105; *M. & F. Pass. R. Co. v. Kelley*, 102 Pa. St. 115; *Fenton v. Second Avenue R. Co.*, 126 N. Y. 625, 26 N. E. 967; *Rack v. Chicago City Ry. Co.*, 173 Ill. 289, 50 N. E. 668, 44 L. R. A. 127. The evidence of appellant tended to show that the horse and wagon of appellee were left standing upon the street in such position that its car could safely pass the same, and that it remained in such position

until the car was so near the horse and wagon that it was impossible for the motorman to stop the car before it would come in contact with said wagon if it was driven upon the track, when the appellee, without warning, turned upon the track. It is clear that negligence cannot be imputed to the motorman because he did not stop the car while the horse and wagon were standing near the curb and out of the line of contact with the car. The peril to appellee did not commence and become apparent until he turned upon the track. Then, and not until then, was the motorman required to act. To hold that it was the motorman's duty to stop the car because the horse and wagon were standing near the track, although sufficiently distant to permit the car to pass in safety, would be to impose upon the appellant a duty not imposed upon it by law. Neither was the motorman required to assume that, when his car was too near the horse and wagon to permit him to stop his car before it would strike the wagon, the appellee would suddenly and without notice drive upon the track. He was only required to operate his car with reference to perils which reasonably might be expected to occur. To require him to run his car with such caution as to guard against unusual or extraordinary perils would be to require him to so operate his car as to prevent the practical operation of the road. The instruction correctly stated a principle of law which was applicable to the case, the principle contained therein was not given to the jury in any other form, and the instruction should have been given.

It is, however, said that there was no evidence upon which to base said instruction, and for that reason it was not error to refuse it. We do not so understand the record. Henry Vornkahl, the motorman, testified:

"In July, 1900, I was in the employ of the Union Traction Company. I was operating a car on that date on Twelfth street. I remember an accident by which my car ran into a covered wagon. That occurred just a little way east of Halsted street—I should think about 130 or 140 feet. I didn't measure it. I stopped on both sides of Halsted street. After leaving Halsted street I went right down the street. There was no obstruction or anything in the way east of Halsted street. There was a wagon standing out at one side of the track, and I didn't see no driver get into

the wagon. The wagon was standing there. It was a one-horse covered vestibule confectionery wagon. It was standing when I saw it. The horse was facing east — the same way the car was going. The wagon was standing right near the curb. It is a narrow street — sixty feet wide. There was a show for me to go by the wagon. The wagon was standing. I seen it down the street. I seen the wagon, and when about forty feet of the wagon the horse stepped over north — that is, he turned to the left. I rang the bell right along, and it didn't make any difference. He didn't look. I tipped them over. I stopped my car with the brake. It was a hand brake. I was standing on the front of the car. I commenced to apply the brake as I seen the man pull over. He was then something like forty or fifty feet away. I did not succeed in stopping the car until I hit him. The car ran about four or five feet after it struck him. There were two cars in that train. When I struck this wagon I tipped it over — turned it over on the right side, so that the right side of the wagon was down against the ground. After the collision the wagon lay in the street right beside the car, on the north side of the car."

Olaf Lindstrom, the conductor in charge of the motor car, testified:

"I am a conductor in the employ of the Union Traction Company. I was in its employ in July, 1900. I was operating a car on West Twelfth street that day. I remember an accident to Mr. Browdy. It was a covered candy wagon. The wagon, when I first saw it, was on the south side of the street. I was conductor on the first car — the motor car. There were two cars in that train. When I first saw this horse and wagon I was on the rear platform. My car was east bound. We had left Halsted street. It was a covered, one-horse wagon. It was facing east. It was standing between the curbing and the tracks. Well, as we had left Halsted street, about — well, it was about, well, say fifty to seventy-five feet, I looked out on the side and saw a wagon there. That was all there was to it; and the motorman he was ringing his gong. As he came up closely he pulled right in front of it. The motorman put on the brake as soon as he see he was going to pull across the tracks, and, of course, the car struck the hind wheel. He made just a little circle. I should think the car was about thirty feet, or something like that, at the time he commenced to make the circle. The wagon was not traveling along on that track. The car struck the left hind wheel of the wagon. It tipped the wagon over. The wagon lay on the ground on the right side of the wagon. The car stopped immediately. The front end of the car was clear of the wagon, so the car could have gone by, but it stopped probably five feet in front of the rear wheel of the wagon. I saw the horse when it turned. He tapped the bell quickly. You can hear the motion of the brake when he sets it quick. The car was stopped in about twenty-five feet, I should think, from the time he applied the brake."

Walter Lindberg, the conductor in charge of the trailer, testified:

"I am a conductor on a street car, in the employ of the Chicago Union Traction Company. I was in the employ of that company in July, 1900. I was operating a car on West Twelfth street in that month. I remember the occasion of a collision with a wagon of Maurice Browdy, the plaintiff, just this side of Halsted street, in that month. I was a conductor then. There were two cars in that train. I had charge of the rear car. I saw the wagon before the collision. When I first saw it, it was on the south side of the street. It was standing still at that time. It was about two feet from the curb. The horse was facing east. I did not see a man about there. The wagon was standing there when we were going east, and, of course, I was on the rear platform at the time, and when the car was almost up to the wagon the wagon started and turned right in front of the car. At the time the wagon started up, the train was about fifty feet away from the wagon. The people on the car saw the horse was coming around toward the track. The motorman started to ring the gong, and the people hollered, and he hollered, and he started to set the brake. The car struck the wagon after the wagon turned into the track. The wagon was not on the track going east at that time. When it crossed, it crossed from the south to the north side—right across. The car struck the left hind wheel. At the time of the collision I was on the rear platform and helped stop the car, and as soon as the car was stopped I jumped off in front. I was on the rear platform, and I started to set the brake when I saw the horse coming toward the track."

Jesse Steipp, a passenger, testified:

"I live at 4067 Dearborn street. I am a janitor. I remember a collision on Twelfth street, east of Halsted street, in July, 1900. I saw it. I was on about the third or fourth seat in the front car. The car was moving east. I was on the left side of the car—that is, the north side. I saw the man who was driving the wagon at that time. I do not recognize him now. There was a gray horse on the wagon. It was going north when I first saw it. The wagon was to the right of me when I saw it. The horse was about three feet from the track when I first saw it. I guess I was about thirty-five or forty feet from the horse when I first noticed it within three feet of the track. At that time the gripman was ringing the bell and put on the brake, and the wagon was going across, and the car hit the hind wheel and turned him over. After the wagon was turned over, the car ran about three or four feet, I think. When the car stopped, the front end of the car was about three or four feet east of the wagon."

Mrs. James Rupp, also a passenger, testified:

"I remember an accident occurring on a street car on Twelfth street, near Halsted, in July, 1900. I was sitting on the first seat of the car. The car was going east. My husband was with me. He sat on my left. He was on the outside. The motorman was on the platform. That is all I remember. There was nobody on the seat on the other side of the door. When I first saw this wagon the horse was on the track starting to cross over to the other side. The horse's head was turned north. I saw the horse on the track—the whole horse was on the track. The wagon at that time was on the south side of the track. The car was thirty or forty feet away when I saw the horse and wagon in that condition. The horse attracted my attention first. Just as soon as I see the horse on the track the motorman sounded the gong and turned the power off as quick as he can with both hands. I don't know that he did that with both hands, but he used both hands. The car went slower. I did not hear any hollering until the car was stopped. At the moment I was excited myself. I don't just remember. The car struck the left wheel on the back of the wagon. It tipped the wagon to one side—to the right side of the wagon. The car stopped. When the car stopped it was even with the wagon."

The evidence, as shown by the foregoing excerpts from the testimony of the witnesses called by the appellant, was amply sufficient to require the submission to the jury of the issue covered by the instruction. While the evidence was conflicting, it was not the province of the trial court, by reason of that fact, to withdraw the issue thus made by the appellant from the jury. Each party has the right to have the jury instructed upon his theory of the case, if it has a basis in the evidence upon which to rest. In *Chicago, Rock Island & Pacific Ry. Co. v. Lewis*, 109 Ill. 120, on page 134, it was said: "It is not necessary the court should be satisfied the hypothetical case stated in an instruction is fully sustained by the testimony before it would be required to submit it to the jury. That would practically include the services of a jury, and would debar a party of the constitutional right to have his cause tried by a jury. The court might take one view of the evidence, and yet, if submitted, a jury might reach a different conclusion, and it is for that reason a party has the right to have submitted any hypothetical case the testimony tends to sustain, otherwise the court might try the cause without the intervention of a jury in the first instance."

We are of the opinion said instruction was vital to the proper presentation of the defense sought to be interposed by the appellant, and that its refusal was reversible error. The judgments of the appellate and superior courts will, therefore, be reversed, and the cause remanded to the Superior Court for a new trial.

Reversed and remanded.

Chicago City Railway Co. v. O'Donnell.

(Illinois — Supreme Court.)

1. **DEATH OF NEWSBOY RIDING AS TRESPASSER ON CAR, CAUSED BY BEING COMPELLED TO JUMP OFF.**¹—The plaintiff's intestate, a newsboy nine years of age, was riding on the lower step on the outside of the iron gate next to the track for west-bound cars; the car on which he was riding was going east. The plaintiff's evidence tended to show that the conductor approached him in a threatening manner and directed him to jump off. The car at the time was traveling at a speed of eighteen or twenty miles an hour. In response to the threatening attitude of the conductor the newsboy jumped and fell upon the west-bound track and was so stunned as to be unable to reach a place of safety before the approach of a car upon such track, and he was struck and instantly killed. The testimony was conflicting as to the attitude of the conductor, the conductor himself testifying that he did not want the boy to get off at the time because of the excessive speed of the car, and told him to hang on. It was held that the case was properly submitted to the jury, and if the testimony for the plaintiff was believed by the jury it was sufficient to sustain the verdict.
2. **INSTRUCTION AS TO WANTON NEGLIGENCE.**—An instruction to the effect that if the jury believed that the car from which the plaintiff's intestate jumped was running at such a rate of speed as to make it dangerous for a person to jump from the car, and that the conductor willfully and wantonly compelled the decedent to jump from the car while running at such a rate of speed, and that the conductor's conduct showed a reckless disregard of the decedent's safety, and that thereby the decedent was thrown down upon the adjoining track, and

1. See *Indianapolis St. Ry. Co. v. Hockett*, 1 St. Ry. Rep. 115, (Ind.) 67 N. E. 106; *Aiken v. Holyoke St. Ry. Co.*, 2 St. Ry. Rep. 416, (Mass.) 68 N. E. 238; *Albert v. Boston Elev. Ry. Co.*, 2 St. Ry. Rep. 448, (Mass.) 70 N. E. 52; *Monehan v. South Covington & Cin. St. Ry. Co.*, 2 St. Ry. Rep. 312, (Ky.) 78 S. W. 1106.

while lying thereon in a dazed condition was run over by a car upon such track, the defendant was liable, although the motorman of the west-bound car was not at fault, was sustained as a correct statement of the law.

APPEAL by defendant from judgment for plaintiff. Decided February 17, 1904. Reported 207 Ill. 478, 69 N. E. 882.

Wm. J. Hynes, Samuel S. Page, and Watson J. Ferry (Mason B. Starring, of counsel), for appellant.

James C. McShane, for appellee.

Opinion by CARTWRIGHT, J.

This is an action on the case instituted by appellee, as administrator of the estate of Michael B. Rowen, deceased, in the Superior Court of Cook county, to recover damages for the death of said Michael B. Rowen, who was run over and killed by one of appellant's cars. The declaration alleged that his death was caused by willful and wanton conduct on the part of servants of appellant. The plea was the general issue, and a trial resulted in a verdict of \$5,000 for appellee. Upon the argument of a motion for a new trial, appellee remitted \$1,500, and the court overruled the motion and entered judgment for \$3,500 and costs. The Appellate Court for the First District affirmed the judgment.

At the conclusion of the evidence in the case, defendant entered a motion to instruct the jury to find it not guilty, and the motion was denied. The declaration contained three counts, but a demurrer was sustained to the first count, and the case went to trial on the second and third. The second count alleged that Michael B. Rowen was a minor, aged nine years, and was lying in a helpless condition on the defendant's track in the city of Chicago; that, by the exercise of ordinary care on the part of defendant's servants in charge of one of its cars, his presence could have been discovered and the car could have been stopped before running over him, but that defendant's servants recklessly, negligently, and improperly ran the car over him and killed him. The third count alleged that defendant operated double tracks running east and west on Root street, in said city; that Michael B. Rowen was riding, but not as a passenger, on one of defendant's cars, which

was running east at such a high rate of speed as to make it dangerous for a person to alight therefrom; that the conductor in charge of said car willfully, wantonly, and recklessly, by ordering Rowen to get off the car, and by a threatening and menacing attitude toward him, and by attempting to strike and grab him, compelled him to jump from the car, and, in doing so, he was thrown and fell with great force on the track for west-bound cars, so as to render him helpless; that, while so lying in a helpless condition, defendant was running another car west, and the servants of defendant in charge of the same, by the exercise of ordinary care, could have discovered him lying on the track, but that they wantonly, recklessly, and negligently ran the car over him and killed him.

There was no evidence tending to sustain the second count. The accident occurred in the evening of January 5, 1900, after dark, and the evidence showed, without contradiction, that the motorman in charge of the west-bound car had no knowledge that any one was lying upon the track, nor any reason to suspect that such was the case, until he received a warning, and that he made every possible effort to stop the car and prevent the accident. There was an entire failure to prove either willful, wanton, or negligent conduct on the part of any one in charge of that car. The only evidence tending to sustain a cause of action related to the alleged actions of the conductor of the east-bound car, under the charge made in the third count. There were double tracks in Root street; the east-bound cars using the south track and the west-bound the north track. Passengers were not allowed to get on or off the cars from the side next to the adjoining track, and the cars were equipped with iron gates on that side to keep passengers from getting on or off. When the east-bound car reached the Ft. Wayne tracks the conductor got off and preceded the car across the railroad tracks, and then got on at the front end of the car, coming through and collecting fares. As the car was so crossing the Ft. Wayne tracks, Michael B. Rowen, who was a news-boy, nine years old, got on the lower step next to the track for west-bound cars, outside of the iron gate. He had some newspapers under his arm and held onto the irons by his hands. A young man named Garfield Andrews stood inside the gate in

front of Rowen to conceal him from the sight of the conductor. The conductor, having passed through the car to the rear, came out on the middle of the platform, and Rowen either whistled or Andrews spoke to him, which attracted the attention of the conductor, and he asked Andrews who was behind him. Andrews stepped to one side and the conductor saw the boy. The liability of the defendant depends upon what the conductor then did, and that, with the speed of the car, is the only disputed fact in the case. There were but two persons who knew anything about it — one being Garfield Andrews and the other John Nelson, the conductor — and they contradicted each other. Andrews testified that the conductor told the boy to get off, and raised his arm in a threatening attitude and moved toward him; that the witness told the conductor the car was going too fast; and that when the conductor told the boy to get off and moved toward him in a threatening manner the boy let go and jumped off. The conductor testified that when Andrews moved aside, and he saw the boy hanging on the handrail next the gate, the witness said, "What are you doing there?" that Andrews said, "Oh, let him ride;" that the boy leaned forward as though he were going to let go or fall off, and the witness said, "Hold on there;" and that at the same moment the boy swung aside and jumped off. The evidence for the plaintiff tended to show that the car was going eighteen or twenty miles an hour, and the evidence for the defendant was that it was going seven or eight miles an hour. The conductor testified that he did not want the boy to get off at that time; that he did not know him, or attempt to make him get off; and that he would not want the boy to jump off, going at the rate of speed the car was moving, because he would be likely to fall and be hurt. When the boy swung off his feet went out from under him and he tripped or fell across the other track. A car was coming from the other way, and Andrews jumped off and ran toward the other car, holding up his hand and shouting. The conductor rang his bell for an emergency stop, and then jumped off too. As the cars approached each other the gongs of both were sounded. Andrews and the conductor both shouted to the motorman of the west-bound car, and did everything they could

to stop it; and, when the motorman saw and heard the warnings, he did everything he could to stop.

The boy was not a passenger, and had no intention of paying fare, but was trying to get a ride by standing on the lower step and hanging onto the iron outside of the gate, where passengers were not received or allowed to enter the car. The defendant was not bound to exercise toward him the care owing to a passenger, but it was bound to not wantonly or willfully inflict injury upon him. The testimony of Andrews tended to prove a willful and wanton injury, and required the submission of the issue to the jury. It seems to be conceded that his testimony did tend to prove such an injury, but it is insisted that the testimony of the conductor was the more probable, and that the circumstances of the case should have convinced the court and jury of its truth. That was a question for the Appellate Court, which is no longer open to inquiry. Cars were passing very frequently on the adjoining track, and the tracks were so close together that passengers were not allowed to enter or leave the car on the side next the other track, doubtless because of the danger. If the testimony of Andrews concerning the action of the conductor was believed, the circumstances tended to show that the accident was a natural and probable consequence of the wrongful act, and such as a person of ordinary prudence ought to have foreseen would be likely to result.

It is also assigned as error that the court gave, at the request of plaintiff, the following instruction:

"The court instructs the jury that if you believe from the evidence that defendant's east-bound car, at the time and place in question, was running at such a high rate of speed as to be dangerous for deceased, or any ordinary person so situated, to jump from said car, and that said conductor, while acting within the scope of his authority as such conductor, if he was so acting, willfully and wantonly compelled deceased to jump from said car in manner and form as charged in the declaration, if he did do so, and while it was running at such rate of speed, and that said conductor's conduct in this regard showed a reckless disregard of deceased's safety, and that deceased was thereby thrown down on the adjoining track and rendered helpless, and while so lying upon said track was run over and killed by the west-bound car before it could be stopped, then you should find the defendant guilty, even though you should find from the evidence that there was no fault upon the part of the motorman of the west-bound car."

The rule of law stated in the instruction is correct. If the conductor of the east-bound car was guilty of a willful and wanton act which was the efficient cause of the deceased falling upon the track and lying there in a helpless condition, where he would naturally be in danger of being run over and killed by west-bound cars, the plaintiff could recover, although the injury actually resulted without fault of those in charge of the west-bound car. Cooley Torts, 70. The objection to the instruction is based on the form of the pleadings. The instruction could only apply to the third count, which charged wanton and willful conduct on the part of both the conductor of the east-bound car and the motorman of the west-bound car; and it is contended that, in order to justify a recovery, it is necessary to prove both charges; that the count stated but one cause of action, based upon two acts conjointly committed by the conductor of one car and the motorman of another, from which the injury resulted; that the proximate cause of the injury was alleged to be the reckless and wanton negligence of the motorman of the west-bound car, and not the act of the conductor in driving the deceased from the east-bound car; and that the instruction was bad in permitting a recovery where the evidence showed that there was no fault on the part of the motorman of the west-bound car. It is a settled rule that a plaintiff must recover, if at all, on the case stated in his declaration. He cannot make one case by allegation, and recover on another case made by the proof; but in this case there was an attempt to state in the declaration two independent wrongful acts, either of which would justify a recovery, and the question is whether the plaintiff was bound to prove both. If the deceased was lying in a helpless condition on the track, and the motorman of the west-bound car, by the exercise of ordinary care, could have discovered him, but wantonly, recklessly, and negligently ran the car over him and killed him, the plaintiff could recover, regardless of the question how the deceased came to be on the track. On the other hand, if the deceased was on the track in a helpless condition through the willful and wanton act of the conductor of the east-bound car, plaintiff could recover, regardless of the question whether the act of the motorman was wrongful or innocent. No objection was made to the count, and, if there was a fault in

it, it consisted in the violation of the rule that each count must state a single cause of action, and must not state different facts or sets of facts, any one of which would justify a recovery. That objection is to be raised and pointed out by special demurrer. The alleged acts of the conductor and motorman were not joint or concurrent. Neither was the nature of the act of the motorman, as willful or otherwise, a matter of essential description of the injury, which must be proved as laid. We think that the charges were divisible, and the rule is that, in actions for torts, plaintiff may prove a part of his charge, if there be enough proved to sustain his charge. *Chicago & Grand Trunk Ry. Co. v. Spurney*, 197 Ill. 471, 64 N. E. 302. There was, therefore, no error in giving the instruction.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

Chicago City Railway Co. v. Handy.

(Illinois — Supreme Court.)

EVIDENCE; EXAMINATION OF EXPERT FOR STREET RAILWAY COMPANY.—Where a physician who is regularly employed at a stated sum *per diem* by a street railway company, is called as an expert to testify as to the injuries sustained in consequence of the alleged negligence of the company, it is competent to show that such expert has received from the company a greater compensation than the fees allowed by the statute, and that he has been frequently employed by the company as an expert, or to prove other facts and circumstances naturally creating a bias in the mind of the witness in favor of the company and against the person injured.

APPEAL by defendant from judgment for plaintiff. Decided February 17, 1904. Reported 208 Ill. 81, 69 N. E. 917.

William J. Hynes and *Edward C. Higgins* (*Mason B. Starr*-ing, of counsel), for appellant.

Theodore G. Case and *John T. Murray*, for appellee.

Opinion by Boggs, J.

The judgment in the sum of \$1,000, entered in the Superior Court of Cook county in favor of the appellee against the appellant company as damages for personal injuries sustained by the ap-

pellee in consequence of the alleged negligence of one of the appellant's conductors, was, on appeal, affirmed by the Appellate Court for the First District. By a further appeal the record has been brought into this court for review.

The grounds urged for reversal are: "First, because of alleged improper remarks and comments made by counsel for appellee in the cross-examination of witnesses and in his argument to the jury; second, for the refusal to give instructions Nos. 15 and 16, requested by the appellant."

In the brief of counsel for the appellant it is urged that in the trial court counsel for the appellee made improper remarks and comments in the cross-examination of Mrs. Lilly Bond and Dr. Leeming, two witnesses introduced in behalf of the appellant company. It does not appear from the record that any objection was made to the trial judge as to the alleged misconduct of counsel during the cross-examination of Mrs. Bond, or that the attention of the court was in any way called thereto or any ruling asked or obtained. In the cross-examination of Dr. Leeming, after the witness had testified that he charged the appellant company \$50 per day for his services as an expert witness, and that he had frequently rendered services for the company in other cases, he was asked, "How many times have you testified for the Chicago Union Traction Company in the last four or five years?" This was objected to "as incompetent and irrelevant in this case." The court sustained the objection, and after the witness had further stated that he had testified in six other cases in the last six months for the appellant company, and that he had rendered other services for the appellant company than giving testimony, and had made other statements relative to his connection with the appellant company, he was asked: "Have you any idea how much money you have received from the Chicago City Railway Company within the last four or five years?" This was objected to by counsel for the defendant as immaterial in this case, and the following colloquy occurred between Mr. Case, attorney for appellee, and Mr. Brady, attorney for the appellant company, and the court:

"Mr. Case: I propose to show — I don't mean to cast any reflections — that he is virtually an employee of this company.

Mr. Brady: Well, why don't you ask him the direct question? Mr. Case: Because you objected to it. Mr. Brady: Well, I don't object to this, your honor. The Court: He stated how frequently he is there. Mr. Brady: Yes. The Court: And what his charges are per day. Mr. Brady: Yes. The Court: You can find out how often he is employed, and how long. I think that is the only material part here, Mr. Case. Mr. Case: I think I have about covered that. That is my impression." The examination of the witness was concluded without further objection.

It is competent to show that a witness has charged or expects to receive greater compensation than the fees allowed by the statute, and that he is in the employ of one of the litigants regularly or frequently as an expert witness, or to prove facts and circumstances which would naturally create a bias in the mind of the witness for or against the cause of either of the litigants. Expert witnesses are often found to be necessary, and while there is no good reason that any one who has the requisite special knowledge should not give testimony as an expert witness and receive greater compensation therefor than the fee allowed a witness by the statute, if the party calling him voluntarily consents to pay such greater compensation, still the fact that he receives such additional compensation may be very properly shown to the jury for their consideration when determining the weight and value of his testimony, and any fact which tends to show that he has the feelings of a partisan for the cause of one of the litigants or a bias against that of the other may be shown for the like reason. We are unable to see that the appellant company has any just cause of complaint of any ruling made by the court during the cross-examination of Dr. Leeming.

No objection was entered or any ruling of the court asked with reference to the alleged improper remarks of counsel for appellee during the course of his argument to the jury. We have frequently decided such complaints cannot be made for the first time in this court.

Twenty instructions were given in behalf of the appellant company, and the refusal to give instructions Nos. 15 and 16 might well be sustained on the ground that all contained in them

proper to be given was but a repetition of that contained in other given instructions. The two instructions were not presented to the court within the time limited by the rules of the court for the presentation of instructions. Nor do we think the suggestion well advanced that the occasion for these instructions arose during the argument of counsel for the appellee.

The judgment must be and is affirmed. Judgment affirmed.

Chicago City Railway Co. v. Leach.

(Illinois — Supreme Court.)

1. **RELATION OF FELLOW SERVANTS; WHEN QUESTION IS FOR THE JURY.**—The court is to determine as a matter of law the facts which will create the relation of fellow servants; but the question as to whether such facts exist is a question of fact for the jury.
 2. **CONDUCTOR OF ONE CAR AS FELLOW SERVANT OF A GRIPMAN ON ANOTHER CAR.**—Where the evidence shows that a conductor on one car and a gripman on another were in the same general service, and the same general line of employment, and that it was the duty of the employees
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FELLOW SERVANT RULE AS APPLIED TO STREET RAILWAY EMPLOYEES.

1. In general.
2. Who are fellow servants.
 - a. In general.
 - b. Employees engaged in same general business.
 - c. Duties bringing servants into relation with each other.
 - d. Street railway employees.
3. Negligence of vice-principal.
4. Liability for injuries from defects, caused by negligence of fellow servant.
5. Effect of statutes modifying common-law rule as to employer's liability.

1. In general.—Unless otherwise provided by statute the common-law rules relieving a master from liability for injuries to a servant caused by the negligence of a fellow servant are applicable to persons and corporations employing servants in the operation of street railways to the same extent and in the same manner as in the case of servants of other employers.

2. Who are fellow servants. a. In general.—The general rule is that those entering the service of a common master become thereby engaged in a common

on one car or train of cars to so run it as not to injure those on the car or train next preceding, and that the duties of the employees on such cars and trains were such as to bring them into habitual association, with power and opportunity to influence each other by advice and caution; and where it appears that they were in the strictest sense engaged in the same character of service in which they were brought into such relation to each other, as to depend upon each other for their safety, and with power to observe the manner in which each discharged his duty, and to influence each other by caution, advice, and example, they are as a matter of law fellow servants, and where the conductor is injured by the negligent acts of the gripman on another car he cannot recover damages for his injuries from the company.

APPEAL by defendant from a judgment of the Appellate Court affirming a judgment for the plaintiff. Decided February 17, 1904. Reported 208 Ill. 198, 70 N. E. 222.

W. J. Hynes, S. S. Page, and H. H. Martin, for appellant.

Wing & Wing and James C. McShane, for appellee.

Opinion by **CARTWRIGHT, J.**

This case was before us on a former appeal, when the judgments of the Appellate Court for the First District and the Su-

service, and are fellow servants. *Northern Pacific R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994. To constitute fellow servants, employees need not be at the same time engaged in the same particular work. It is sufficient that they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purpose, although one injured may be inferior in grade and is subject to the direction and control of a superior, whose act caused the injury. *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. Rep. 631. The term "fellow servant," within the meaning of the rule, includes all who serve the same master, work under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it. *Wonder v. Baltimore & Ohio R. Co.*, 32 Md. 411, 3 Am. Rep. 143.

b. **Employees engaged in same general business.**—The rule is that employees engaged in the same general business are fellow servants, though they are in different departments of work. *Farwell v. Boston & N. R. Co.*, 4 Mete. (Mass.) 49, 38 Am. Dec. 339; *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 44 N. W. 270, 18 Am. St. Rep. 441; *Ross v. N. Y. C. & H. R. R. Co.*, 5 Hun (N. Y.), 488; *Missouri Pacific Ry. Co. v. Watts*, 63 Tex. 549; *Moore's Adm'r v. Richmond & A. R. Co.*, 78 Va. 745, 49 Am. Rep. 401; *Unfried v. Baltimore & Ohio R. Co.*, 34 W. Va. 260, 12 S. E. 512.

perior Court of Cook county were reversed for error of the Superior Court in sustaining a demurrer to a plea of the statute of limitations. An additional count of the declaration, stating a new cause of action, had been filed after the statute had run, and issues of fact under that count had been submitted to the jury,

c. Duties bringing servants into relation with each other.—When servants are employed and paid by the same master, and their duties are such as to bring them into such a relation that the negligence of the one in doing his work may injure the other in the performance of his, then they are engaged in the same common business, and being subject to the control of the same master, they are fellow servants, within the generally accepted meaning of the rule, no matter how different the grades of service or compensation may be, or how diverse or distinct their duties may be. *McMaster v. Illinois Cent. R. Co.*, 65 Miss. 264, 4 So. 59, 7 Am. St. Rep. 653. This rule does not seem to obtain in Illinois. *Louisville, E. & St. L. Consol. R. Co. v. Hawthorne*, 147 Ill. 226, 35 N. E. 534; *Chicago & A. R. Co. v. Hoyt*, 122 Ill. 369, 12 N. E. 225. In this State it is held that fellow servants, within the rule exempting the master from liability for their negligence, must be directly co-operating with each other in a particular business, in the same line of employment, or must be so consociated that their usual duties shall bring them habitually together, so that they may exercise a mutual influence upon each other, promotive of proper caution. *Chicago & N. W. Ry. Co. v. Snyder*, 117 Ill. 376, 7 N. E. 604; *Chicago & A. R. Co. v. O'Brien*, 155 Ill. 630, 40 N. E. 1023.

d. Street railway employees.—A track repairer and an engineer of an elevated railroad company are fellow servants. *Van Wickle v. Manhattan R. Co.*, 32 Fed. 278. The motorman of an electric car and an employee put in charge of the track are fellow servants. *Rittenhouse v. Wilmington St. R. Co.*, 120 N. C. 544, 26 S. E. 922. The conductors of electric railway cars on the same road are fellow servants. *Baltimore Trust & Guaranty Co. v. Atlanta Traction Co.*, 69 Fed. 358. The conductor and motorman of an electric car are fellow servants, and the negligence of the former is imputable to the latter. *Savage v. Nassau Elec. R. Co.*, 42 App. Div. (N. Y.) 241, 59 N. Y. Supp. 225, affirmed, 168 N. Y. 680. But the gripman of one street car is not the fellow servant of the conductor of another car injured by the former's negligence, where there is no association between the men; the rule in Illinois being that to create the relation of fellow servants it is essential that at the time of the injury they shall be directly co-operating in the particular business in hand, or that their usual duties shall bring them into habitual consociation, so that they may exercise an influence on each other promotive of proper caution. *North Chicago St. Ry. Co. v. Conway*, 76 Ill. App. 621.

The cases here cited to the effect that engineers on different locomotive engines are fellow servants may be useful in determining the relation existing between motormen and gripmen of the cars upon a street railway. In the following cases it was held that locomotive engineers on the same road are

and found in favor of appellee. *Chicago City Ry. Co. v. Leach*, 182 Ill. 359, 55 N. E. 334. The case has since been tried upon proper issues, resulting in a verdict for appellee for \$15,000, upon which judgment was entered. On appeal to the Appellate Court for the First District, the judgment was affirmed.

fellow servants: *Van Avery v. Union Pacific R. Co.*, 35 Fed. 40; *Ohio & M. Ry. Co. v. Robb*, 36 Ill. App. 627; *Terre Haute & I. R. Co. v. Leeper*, 60 Ill. App. 194, affirmed, 162 Ill. 215, 44 N. E. 492; *Enright v. Toledo, A. A. & M. Ry. Co.*, 93 Mich. 409, 53 N. W. 536; *Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977; *Cole v. Northern Cent. R. Co.*, 12 Pa. Co. Ct. 573.

The gripman of a cable car and a watchman, whose duty it was to give signals at a curve to prevent more than one train from passing at a time are fellow servants. *Murray v. St. Louis Cable & W. Ry. Co.*, 98 Mo. 572. The negligence of an inspector of the electrical apparatus of a trolley car who, after inspecting it for efficiency, says, "All right, put your pole on," acting on which the conductor puts on the trolley and the car runs on him, the controller being open, is that of a fellow servant. *Sugard v. Union Traction Co.*, 201 Pa. St. 562, 51 Atl. 325. A street car repairer and a person engaged as a car starter, whose duty it is to dispatch the cars at the times scheduled, are not fellow servants. *Quinn v. Brooklyn Hts. R. Co.*, 2 St. Ry. Rep. 803, 91 App. Div. (N. Y.) 489, 86 N. Y. Supp. 883. A person so employed as a car starter is engaged in duties similar to those of a train dispatcher upon a steam railroad. The rule seems to be that a train dispatcher and the employees of the company engaged in the operation of its trains are not fellow servants, and that such employees may recover for the injuries resulting from the negligence of the train dispatcher. *Little Rock & M. R. Co. v. Barry*, 58 Ark. 198, 23 S. W. 1097, 25 L. R. A. 386; *McKune v. California S. R. Co.*, 66 Cal. 302, 5 Pac. 482; *Darrigan v. N. Y. & N. E. R. Co.*, 52 Conn. 285, 52 Am. Rep. 590; *Chicago, B. & Q. R. Co. v. Young*, 26 Ill. App. 115; *Hunn v. Michigan Cent. R. Co.*, 78 Mich. 513, 44 N. W. 502, 7 L. R. A. 500; *Smith v. Wabash, St. L. & P. Ry. Co.*, 92 Mo. 359, 4 S. W. 129, 1 Am. St. Rep. 729; *Hankins v. N. Y., L. E. & W. R. Co.*, 142 N. Y. 416, 37 N. E. 466, 40 Am. St. Rep. 616, 25 L. R. A. 396; *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. Rep. 631; *Clyde v. Richmond & D. R. Co.*, 69 Fed. 673; *Baltimore & Ohio R. Co. v. Camp*, 65 Fed. 952, 13 C. C. A. 233. The following cases reported in this series pertain to the relationship of fellow servants between employees of street railway companies: *Indianapolis & Greenfield R. T. Co. v. Foreman*, 2 St. Ry. Rep. 206, (Ind. Sup.) 69 N. E. 669 (holding that an employee engaged in track construction is a fellow servant of a motorman); *White v. Lewiston & Youngstown F. Ry. Co.*, 2 St. Ry. Rep. 805, 94 App. Div. (N. Y.) 4, 87 N. Y. Supp. 901 (holding that a conductor and a motorman on the same car are fellow servants); *Stocks v. St. Louis Transit Co.*, 2 St. Ry. Rep. 633, (Mo. App.) 79 S. W. 476 (holding that the conductor of one street car and the motorman of another are fellow servants); *Johnson v. Metropolitan St.*

Plaintiff was a conductor on defendant's street railway, and, in his declaration, alleged that he was injured through the negligence of other servants of the defendant. On the trial he offered evidence tending to prove that his injury was caused by the negligence of Golden, a gripman; and the first alleged error consists

Ry. Co., 2 St. Ry. Rep. 633, (Mo. App.) 78 S. W. 275 (holding that a statute making a railroad liable for negligence of a coemployee does not apply to a street railroad); *Ryan v. Third Ave. R. Co.*, 2 St. Ry. Rep. 804, 92 App. Div. (N. Y.) 306, 86 N. Y. Supp. 1070; *Metropolitan West Side El. R. Co. v. Fortin*, 1 St. Ry. Rep. 89, 203 Ill. 454, 67 N. E. 977 (in which case it was held that it was proper to leave to the jury under proper instructions the question as to whether a car coupler employed by an elevated railway company at its terminus was a fellow servant of the motorman in charge of a motor car which was negligently operated by him to the injury of the coupler).

3. *Negligence of vice-principal.*—A gripman and a car starter in the employ of a cable street railway company, the latter being stationed at a place on the line to regulate the running time of cars, and with whom it was customary to give orders to the man on such cars, are not fellow servants; the car starter is a vice-principal representing the railway company, and the company is liable for injuries to such gripman, resulting from the negligence of the starter in ordering the gripman to proceed on his trip with a defective grip car. *West Chicago St. Ry. Co. v. Dwyer*, 57 Ill. App. 440.

The mere fact that one of several employees is selected to act as foreman and to direct the other employees in the performance of their duties does not constitute such foreman a vice-principal and make the employer responsible for his negligent acts. As for instance the foreman of a gang of section or track men engaged in the discharge of his ordinary duties is a fellow servant with the other section men. *Clifford v. Old Colony R. Co.*, 141 Mass. 564, 6 N. E. 751; *Gavigan v. Lake Shore & M. S. Ry. Co.*, 110 Mich. 71, 67 N. W. 1097; *Olson v. St. Paul, etc., Ry. Co.*, 38 Minn. 117, 35 N. W. 866; *Spancake v. Phila., etc., R. Co.*, 148 Pa. St. 184, 23 Atl. 1006, 33 Am. St. Rep. 821; *Kansas & A. W. Ry. Co. v. Waters*, 70 Fed. 28, 16 C. C. A. 609. The mere fact that one of the employees is superior to the others does not necessarily destroy the relationship of fellow servants. *Fones v. Philips*, 39 Ark. 17, 43 Am. Rep. 264; *O'Connor v. Roberts*, 120 Mass. 227; *Chamberlain v. Milwaukee & M. R. Co.*, 11 Wis. 238.

It is only where the master withdraws from the management of the business, intrusting it to a middleman or superior servant, or where, as in the case of a corporation, the business is of such a nature that the general management and control thereof is necessarily committed to agents, that the master can be held liable to a subordinate for the negligent acts of one thus acting in his stead. *Malone v. Hathaway*, 64 N. Y. 5, 21 Am. Rep. 573. In the case of *Northern Pacific R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994, the rule was laid down that when the business of the master is of such

in the refusal by the trial court of an instruction offered by defendant that the burden of proof was upon the plaintiff to prove, by a preponderance of all the evidence in the case, that he and Golden were not fellow servants. The instruction correctly stated the law as declared in *Joliet Steel Co. v. Shields*, 134 Ill.

great and diversified extent that it naturally and necessarily separates itself into departments of service, the persons placed by the master in charge of these separate branches and departments, with entire control therein, may properly be considered, with respect to employees under them, as vice-principals and representatives of the master, as fully as if the entire business of the master were placed under one superintendent. To constitute one a vice-principal the master must have committed to him the virtual and substantial control of the business, and the power to do all acts necessary to its conduct. *Willis v. Oregon, etc., Co.*, 11 Oreg. 257, 4 Pac. 121. Where the master exercises no discretion or personal supervision over the actions of his agent or the person whom he has placed in control of other employees, he is liable for the negligence of such agent causing injury to any of such employees. *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. Rep. 634.

4. Liability for injuries from defects, caused by negligence of fellow servant.

—A street railway company, like a steam surface railroad company, is bound to exercise ordinary care, such as a prudent man would use, to keep its cars and apparatus in repair, and if its servants, by reasonable care, might know of defects therein, the company is liable for the damages resulting from such defects, to another employee, who was not connected with the work of inspecting or repairing such cars and apparatus. *Texas & Pac. Ry. Co. v. Barrett*, 67 Fed. 214, 14 C. C. A. 373. The universal rule, therefore, seems to be, as applied to steam railroads and as applicable by analogy to street surface railroads, that a company cannot be relieved of responsibility for injuries to an employee for defects in its tracks, cars, apparatus, or appliances upon the ground that such defects resulted from the negligence of an inspector in failing to discover the defects, or of the person to whom the duty is delegated of repairing such defects. The following cases relate for the most part to steam railroads, but are deemed applicable to street surface railroads: *Toledo, W. & W. Ry. Co. v. Moore*, 77 Ill. 217; *Chicago & E. I. R. Co. v. Kneirim*, 43 Ill. App. 243; *Indianapolis. I. & I. Ry. Co. v. Snyder*, 140 Ind. 647, 39 N. E. 912; *Ohio & M. Ry. Co. v. Stein*, 140 Ind. 61, 39 N. E. 246; *Neutz v. Jackson Hill Coal & Coke Co.*, 139 Ind. 411, 38 N. E. 324; *Ohio & M. Ry. Co. v. Pearcey*, 128 Ind. 197, 27 N. E. 479; *Cincinnati, H. & E. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67; *Branni v. Chicago, etc., R. Co.*, 53 Iowa 595, 6 N. W. 5, 36 Am. Rep. 243; *Missouri Pac. Ry. Co. v. Dwyer*, 36 Kan. 58, 12 Pac. 352; *Lawless v. Connecticut R. W. R. Co.*, 136 Mass. 1; *Conger Morton v. Detroit, etc., R. Co.*, 81 Mich. 423, 46 N. W. 111; *Macy v. St. Paul, etc., Ry. Co.*, 35 Minn. 200, 28 N. W. 249; *Tierney v. Minneapolis, etc., Ry. Co.*, 33 Minn. 311, 23 N. W. 229, 53 Am. Rep. 35; *Fay v. Minneapolis, etc., Ry. Co.*, 30 Minn.

209, 25 N. E. 569, where that subject was given full consideration, and where it was the determining question in the case. The charge in the declaration was that the plaintiff, a track repairer, had been injured by the negligence of other servants of the defendant in placing an iron mold in an insecure and dangerous position near the track; and the declaration neither alleged in express terms that they were not fellow servants of the plaintiff, nor such facts as would lead to that conclusion. It was held that in all actions for negligence the burden is upon the plaintiff to allege and prove such negligent acts of the defendant as will entitle the plaintiff to recover; that it is not sufficient for one servant to prove that he has been injured by another servant of the common master, but that it is also necessary to prove that the relation of the servants is such as to render the master liable to one for the negligence of the other. In the subsequent case of *Louisville, Evansville & St. Louis Consol. R. Co. v. Hawthorn*, 147 Ill. 226, 35 N. E. 534, where the declaration alleged that the plaintiff was a fence builder, and was injured by the negligence of a locomotive engineer, the court calling attention to the fact that in the Shields case there was nothing in the declaration

231, 15 N. W. 241; *Condon v. Missouri Pac. Ry. Co.*, 78 Mo. 567; *Long v. Pacific R. Co.*, 65 Mo. 225; *Jennings v. N. Y., etc., R. Co.*, 12 Misc. Rep. (N. Y.) 408, 33 N. Y. Supp. 585; *Texas & Pac. Ry. Co. v. Thompson*, 70 Fed. 944, 17 C. C. A. 524; *Texas & Pac. Ry. Co. v. Barrett*, 67 Fed. 214, 14 C. C. A. 373; *Union Pac. Ry. Co. v. Snyder*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597.

5. Effect of statutes modifying common-law rule as to employer's liability.—In a number of States so-called Employers' Liability Acts are in force. Some of these acts, notably those of New York (Laws 1902, chap. 600), Alabama (Civ. Code 1896, §§ 1749–1751), and Colorado (Laws 1893, chap. 77), apply to all classes of employees, and contain no exceptions; the Massachusetts act applies to all classes except domestic servants and foreign laborers (Mass. Rev. Laws 1902, chap. 106, §§ 71–79); the act of Indiana applies merely to employees of railroad and other corporations operating in the State, and does not extend to the employees of firms or individuals (Acts of 1893, chap. 130, p. 294). Statutes in other States have been enacted pertaining to the liability of railroad companies for injuries to employees. See Texas Fellow Servants Act of May 4, 1893; Minn. Laws 1887, chap. 13; Missouri Rev. Stats. 1899, § 2873; Miss. Const., § 193. These acts have been held in many cases not to be applicable to street railway companies. See *Indianapolis & Greenfield R. T. Co. v. Foreman*, 2 St. Ry. Rep. 206, (Ind. Sup.) 69 N. E. 669, and note on page 206, *post*.

to show that the other servants were not track repairers with the plaintiff, held that it was not necessary to aver in the declaration, in so many words, that the negligent servant was not the fellow servant of the plaintiff, where the facts stated showed that the relation of fellow servant did not exist. In *Chicago & Alton R. Co. v. Swan*, 176 Ill. 424, 52 N. E. 916, the facts showing the relation of the two servants were stated, and showed that they were not fellow servants, and the same rule was declared. Of course, the rule as to pleading does not apply where the charge of negligence is against the master himself. *Libby, McNeill & Libby v. Scherman*, 146 Ill. 540, 34 N. E. 801, 37 Am. St. Rep. 191. Previous to the *Swan* case, an opinion of an Appellate Court had been adopted in *Chicago & Alton R. Co. v. House*, 172 Ill. 601, 50 N. E. 151, in which it was said that, upon the question whether the servants in that case were fellow servants, appellant was the affirmant, though the declaration contained the negative allegation. No question as to the burden of proof was in any way involved, and it cannot be presumed that the Appellate Court attempted to overrule the decisions of this court on that question. Whatever may have been meant by the statement, if it was intended to establish a new rule as to the burden of proof, it was incorrect. There was no intention in adopting the opinion, or in the case of *Hartley v. Chicago & Alton R. Co.*, 197 Ill. 440, 64 N. E. 382, which referred to it, to overrule the previous cases on that question. It appears to us, however, that the question where the burden of proof rested was properly and sufficiently covered by another instruction given at the instance of the defendant. That instruction stated that the burden of proof was upon the plaintiff upon several different propositions, and that he could not recover unless the fact that he and the gripman, Golden, were not fellow servants was established by a preponderance of all the evidence in the case. That instruction being correct and covering the ground, it was not error to refuse the instruction concerning which complaint is made.

At the close of the evidence the defendant requested the court to give an instruction of not guilty, which the court refused to do, and this ruling is the principal subject of discussion by the respective counsel. Plaintiff was injured by another train, on

which Golden was the gripman, running against the rear of the train on which plaintiff was conductor while plaintiff was on the ground between the cars; and it is contended that his injury resulted from an ordinary hazard of his employment, and from his own negligence in going between the cars and not providing any lookout for approaching trains, and that the plaintiff and Golden were fellow servants of the defendant. The main question is whether plaintiff and Golden were fellow servants; the other questions being controverted questions of fact, which, in our opinion, were properly submitted to the jury.

What facts will create the relation of fellow servants between two employees of a common master is a question of law, and whether such facts exist is ordinarily a question of fact to be submitted to the jury; but where there is no evidence fairly tending to prove that they are not fellow servants, and the undisputed facts show that the relation exists, the question is one of law. If there is any evidence fairly tending to prove the required averment that they are not fellow servants, the court should submit the issue to the jury; but, if there is no controversy about the facts, and they bring the parties within the relation of fellow servants, so that a verdict to the contrary would not be supported by any evidence, the court should not submit the question to the jury. *Abend v. Terre Haute & Indianapolis R. Co.*, 111 Ill. 202, 53 Am. Rep. 616; *Chicago & Eastern Illinois R. Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921. In this case there was no controversy as to the material facts concerning the relation between plaintiff and Golden as servants of the defendant, which were all either proved by the plaintiff, or admitted of record by his counsel upon the trial. If the evidence would justify different conclusions in any respect, it would be with regard to social relations and acquaintance which were wholly immaterial.

The undisputed facts were, in substance, as follows: The accident occurred on September 27, 1893, during the World's Fair. The defendant was operating a double-track cable street railway from Randolph street, on Wabash avenue, to Twenty-second street, and thence on Cottage Grove avenue to Seventy-first street, in the city of Chicago. There was a loop at the north

end, around which the cars ran. At the intersection of Madison street with Wabash avenue, one of the tracks ran east on Madison street one block to Michigan avenue, thence north two blocks to Randolph street, thence west on Randolph street one block to Wabash avenue, and thence south on Wabash avenue. Plaintiff's train consisted of a grip car and two passenger cars. McCarthy was the gripman, plaintiff was the conductor on the car next the grip car, and Baker was the conductor on the rear car. The train was made up at appellant's barn, between Thirty-eighth and Thirty-ninth streets, on Cottage Grove avenue, to make its regular trip north around the loop and back to the south. When the train was leaving the barn, plaintiff boarded it; and, after it had gone a few blocks, he discovered that there was too much slack between the grip car and his car, causing them to bump back and forth. It was his duty to correct this, but he waited to do so until he should reach the north end of the loop, when there would be few, if any, passengers, and he would have more time, and the cable ran at but half as high a rate of speed. The train ran north, and turned from Wabash avenue around the loop. When it reached the east side of Wabash avenue, and was about to turn into that avenue, it was stopped on Randolph street to shorten up the drawbars. The trains ran about two minutes apart, and there was about 300 feet of clear track between the rear of the train and the corner of Michigan avenue, around which the next train would come. The sun was shining, and it was a bright, dry, clear morning. Plaintiff got down from his car, and the gripman, McCarthy, fastened his brake, and went to the rear end of the grip car, and took hold of the next car to hold them together while plaintiff took up the slack. Plaintiff looked eastward, and there was no train in sight, and he then got down between the cars to make the necessary change. Neither McCarthy, the gripman, nor Baker, the other conductor, kept any lookout to see whether any other train was approaching. At the usual time the next train, in charge of Golden, came around the corner of Michigan avenue into Randolph street, and ran, without stopping or warning, against plaintiff's train, driving it around the curve into Wabash avenue, and knocking down the plaintiff, who was dragged along under

the train, and seriously and permanently injured. The evidence tended to prove that Golden was looking to the northeast, and not looking out for plaintiff's train.

Defendant had over 500 gripmen and conductors running its trains, who all had the same headquarters and the same superintendent, and were governed by the same rules. The trains followed each other over the tracks, regulating their movements by the trains ahead. There were frequent stops and delays by obstructions and accidents, or something getting into the slot; and, if a train stopped, the one behind was required and accustomed to stop. If a train lost the cable, it would wait for the one behind to push it to a point where the cable could be taken up. Each train consisted of a grip car and one or more passenger cars, each of which had a conductor. The defendant had two lists—one of conductors, and the other of gripmen—and the men at the head of the gripmen's list ran with the men at the head of the conductor's list, and so on down the line. Whenever a conductor or gripman missed his run, quit the service, or was discharged, all those below him were moved up one point, so that a conductor generally ran with the same gripman; but, on account of the changes, plaintiff ran with many different gripmen. There is no evidence that he ever ran with Golden, and he did not remember that he had ever seen him, but they had run on the same line for several months.

The rule in this State as to what will constitute fellow servants has been very frequently defined and explained. This court has held the master to a stricter accountability for injuries to one servant by the act of another servant than courts in general. The generally prevailing rule that all servants of a common master are fellow servants was rejected, and it was held that, where a servant was employed in a department separate and distinct from that of a servant whose negligence caused an injury, the master would be liable. *Ryan v. Chicago & Northwestern Ry. Co.*, 60 Ill. 171, 14 Am. Rep. 32; *Pittsburg, Ft. Wayne & Chicago Ry. Co. v. Powers*, 74 Ill. 341. The rule as to co-sociation was also adopted, and was first expounded at length in the case of *Chicago & Northwestern Ry. Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 168. In that case, servants of a common

master were classified on the basis of their relation to each other at the time of an injury, or their usual duties. The rule established was that those are fellow servants who are co-operating at the time of an injury in the particular business in hand, or whose usual duties are of a nature to bring them into habitual association, or into such relations that they can exercise an influence upon each other promotive of proper caution. If they are not co-operating in some particular work, or if their usual duties are not such as to bring them into habitual association so that they may have the opportunity and power to influence each other to the exercise of caution, they are not fellow servants. It was said in that case that the rule of *respondeat superior* rests upon considerations of public policy, and is founded on the expediency of throwing the risk upon those who can best guard against it, and that the liability of the master must turn upon the same consideration. This is the principle underlying the application of the doctrine, whether it was adopted on grounds of public policy, or because the risk is assumed by the servant in entering the service; and the relation is made to depend upon the existence of association between servants, which enables them, better than the employer, to guard against risks or accidents resulting from the negligence of each other. The rule, however, does not rest in any degree upon personal acquaintance or actual previous association between the servants, but upon the relation of their duties to each other, and the respective positions which they hold. The rule, stated as a mere abstract proposition, might suggest previous personal acquaintance between individuals, and it is apparent from the opinion of the Appellate Court in this case that that court so regarded it, but this is clearly incorrect.

Counsel for the appellee concede that a personal acquaintance between the plaintiff and Golden was not essential to make them fellow servants; that it was the position which Golden held, and the position which the plaintiff held, which should determine the question; and that, if plaintiff had taken the position of some conductor who had been running the same train with Golden, they would be fellow servants while on the same train, even though plaintiff should be injured within a few minutes after his employment; and their claim is that the employees on different

trains are not fellow servants. The classification is of servants as such, and not of individuals; and, if two servants are brought within the classification, they instantly become fellow servants, although they may never have seen each other before. That was the case in *Abend v. Terre Haute & Indianapolis R. Co.*, *supra*, where it was held that a blacksmith and other employees in a wrecking crew, made for the occasion, became fellow servants. The nature of the employment determines the relation, and the rule must be uniform and capable of a reasonable application. To hold the master exempt from liability for an injury to one who had been long in his service, and had associated with the other employees, and to hold him liable for a like injury under the same circumstances to a new servant, would be wholly unwarranted.

One branch of the doctrine is that those are fellow servants who are directly co-operating with each other in some particular work, and it is contended that the particular work in hand at the time of the accident to plaintiff was the running of defendant's trains at the place of the accident, and, therefore, the employees on the two trains were fellow servants. The rule must have a reasonable and practical interpretation, and, if co-operation in particular work should be construed to mean identical work, the rule would not apply in any case, since no two servants would ever be doing the same identical thing at the same time. A conductor and gripman have separate duties, and yet they are directly co-operating with each other in the particular work of running a train. On the other hand, the particular work in hand does not include the general business of the master. The general business of the defendant was the running of trains on its road, and we do not see how the particular business in which plaintiff was engaged could be extended to include other trains which were following him. The question whether the qualifying words with respect to the exercise of influence modify both branches of the rule is of no importance. Where two servants are directly co-operating in the particular work in hand, they are brought into such relations that they may exercise such influence. *Pagels v. Meyer*, 193 Ill. 172, 61 N. E. 1111. The addition of qualifying words is wholly unnecessary, and, if there is direct co-operation,

nothing further is required to bring them within the relation. Where the servants are not so directly co-operating in some particular work, their usual duties must require co-operation or habitual association.

The remaining question is whether the plaintiff and Golden were fellow servants, under the second branch of the rule, or, in other words, whether the usual duties of the employees of the defendant upon one train were of a nature to bring them into habitual association with the employees on the next train preceding or following them, so that they might exercise an influence upon each other promotive of proper caution. There is no similarity between the relation of servants on different trains on a steam railroad, which are run under orders and directed by a train dispatcher for the purpose of preventing interference and collisions, and the relation of servants on these trains, which followed each other over the tracks, and managed their trains with reference to each other. This case is very much like the case of *Chicago & Eastern Illinois R. Co. v. Driscoll*, *supra*, where it was held that yard crews employed to perform the same character of service at the same time, using the same tracks and working near each other, were fellow servants, though under different foremen. It was there held that an instruction to find for the defendant should have been given on that ground. In *Leeper v. Terre Haute & Indianapolis R. Co.*, 162 Ill. 215, 44 N. E. 492, it was held that a finding by the Appellate Court that an injury to a fireman on one section of a train which was running in three sections was caused by the negligence of an engineer running another section, and that said servants were in the same general grade of service and the same line of employment, whose duty it was to be on constant guard not to injure each other, and whose relation was such as to promote caution for the safety of each other, was a finding that the servants were fellow servants. In this case the undisputed evidence was that plaintiff and Golden were in the same general service and the same general line of employment, and that it was the duty of the employees on one train to run it in such a manner as not to injure those on the train next preceding, and that the duties of employees on such trains were such as to bring them into habitual association, with

power and opportunity to influence each other by advice and caution. They were, in the strictest sense, engaged in the same character of service, in which they were brought into such relations to each other as to depend upon each other for their safety, and with power to observe the manner in which each discharged his duty, and to influence each other by caution, advice, and example. There was no disputed fact to be submitted to the jury, and the facts proved by plaintiff or admitted brought him and Golden within the legal definition of fellow servants. It was, therefore, error to refuse the instruction asked for by the defendant.

The judgments of the Appellate Court and the Superior Court are reversed, and the cause is remanded to the Superior Court.

Reversed and remanded.

RICKS, WILKIN, and MAGRUDER, JJ., dissenting.

Chicago City Railway Co. v. O'Donnell.

(Illinois — Supreme Court.)

1. COLLISION WITH VEHICLE AT STREET INTERSECTION.¹—The plaintiff's intestate was driving a wagon along a street in which the defendant's tracks were laid, behind a covered beer wagon, which obstructed his view of cars approaching upon the tracks. At a street intersection he pulled out from behind the covered wagon and drove on the tracks. His wagon was struck by one of the cars of the defendant and he was thrown therefrom and injured, resulting in his death. The car which struck him was 200 feet away when he turned upon the tracks. There was evidence tending to show that no warning signal was given by the sounding of a gong, and although there was evidence showing that the motorman and others had warned him by calling to him, there was no evidence that he was conscious of such warning. In view of the circumstances of the case and the evidence introduced, it was held that the question as to whether the decedent was guilty of negligence was for the jury.

1. At a street intersection a street railway company occupying one street and a truck driver crossing its track from the other have equal rights of way. *Chapman v. Atlantic Ave. R. Co.*, 14 Misc. Rep. (N. Y.) 384, 35 N. Y. Supp. 1045. At street crossings the rights of a street car and of a vehicle crossing the tracks are equal. *Zimmerman v. Union Ry. Co.*, 3 App. Div. (N. Y.) 219, 38 N. Y.

2. **INSTRUCTION AS TO ORDINARY CARE.**—An instruction to the effect that “ordinary care” is the degree of care which an ordinarily prudent person “situated as the deceased was,” as shown by the evidence, before and at the time of the injury, would usually exercise for his own safety, is not erroneous, on the ground that it assumes that an ordinarily prudent person would be situated as the deceased was situated before and at the time of the accident.

3. **INSTRUCTION AS TO DUTY TO LOOK AND ASCERTAIN APPROACH OF CAR.**—It was held that the court erred in refusing to instruct the jury to the effect that if they believed from the evidence that ordinary care on the part of the decedent required him to look and ascertain before driving on the track whether or not a car was approaching along the track, and that if they believed from the evidence that he had looked and could have ascertained whether or not such car was approaching, and that he was injured because of his failure to so look and ascertain, then the jury should find the defendant not guilty.

Other instructions requested by the defendant were held erroneously refused.

APPEAL by defendant from a judgment of the Appellate Court affirming a judgment in favor of the plaintiff. Decided February 17, 1904. Reported 208 Ill. 267, 70 N. E. 294.

Statement of facts by RICKS, J.

This is an appeal from a judgment of the Appellate Court affirming a judgment for \$2,500 entered upon a verdict rendered by a jury in the Superior Court of Cook county against appellant in an action on the case prosecuted to recover damages on account of the death of John White. The

Supp. 362; *Degnan v. Brooklyn City R. Co.*, 14 Misc. Rep. (N. Y.) 388, 35 N. Y. Supp. 1047. In the case of *O'Neill v. Dry Dock, etc., Ry. Co.*, 129 N. Y. 125, 29 N. E. 84, 26 Am. St. Rep. 512, it was contended by the defendant that its car crossing the street had the right of way, and the paramount and superior right in the street which the driver of a vehicle was bound to respect. The court said: “The rule invoked has its application where the tracks of street railways are laid in the streets. As the cars must run upon the tracks, and cannot turn out for vehicles drawn by horses, they must have the preference, and such vehicles must, as they can, in a reasonable manner, keep off from the railroad tracks so as to permit the free and unobstructed passage of the cars. In no other way can street railways be operated. As to such vehicles the railways have the paramount right, to be exercised in a reasonable and prudent manner. But a railway crossing a street stands upon a different footing. The car has the right to cross and must cross the street, and the vehicle has the right to cross and must cross the railroad track. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the right of the other.” See also *Nellis Street Railroad Accident Law*, p. 270, and cases cited in note 56.

declaration consisted of one count, and alleged that the defendant, through its certain servant then and there in charge of one of its street cars then and there being operated upon and along said railway upon Halsted street in a northerly direction toward and past Forty-second street, so recklessly, carelessly, and negligently ran and drove the said street car at such a high and dangerous rate of speed, and without maintaining a proper lookout, and without giving suitable warning of the approach of said car, that as a result and consequence thereof said car then and there ran against and struck said wagon, etc. A plea of not guilty was filed.

The evidence discloses that at the time of the accident deceased was seventy-four years of age, and in the employ of a lumber company as a sort of errand man, and on the day of the accident was driving a one-horse carpenter wagon belonging to his employer. He had delivered some lumber, and was driving back toward the lumber company's office, south on Halsted street, and immediately before the accident was following a covered beer wagon. Halsted street runs north and south. Appellant had two street-car tracks along Halsted street, the west line being called the "south-bound track" and the east line the "north-bound track." The beer wagon which deceased

Look and listen.—As to the contributory negligence of a driver of a vehicle who fails to stop, look, and listen before crossing a street railway track, see note to *Wolf v. City & Sub. Ry. Co.*, 1 St. Ry. Rep. 667. The cases relating to the duty of a pedestrian or driver of a vehicle to look and listen before crossing a street railway track reported in volume 1 of this series are cited on page 678 of volume 1. The cases in this volume relating to the contributory negligence of a driver of a vehicle in crossing a track in front of an approaching car are as follows: *Union Traction Co. v. Vandercook*, 2 St. Ry. Rep. 231, 69 N. E. 486; *Omaha St. Ry. Co. v. Larson*, 2 St. Ry. Rep. 654, (Nebr.) 97 N. W. 824; *Moran v. Leslie*, 2 St. Ry. Rep. 254, (Ind. App.) 70 N. E. 162; *Linder v. St. Louis Transit Co.*, 2 St. Ry. Rep. 607, (Mo. App.) 77 S. W. 997; *Indianapolis St. Ry. Co. v. Darnell*, 2 St. Ry. Rep. 237, (Ind. App.) 68 N. E. 609; *Heebe v. New Orleans & C. R., etc., Co.*, 2 St. Ry. Rep. 323, (La.) 35 So. 251; *Chicago Union Traction Co. v. Chugren*, 2 St. Ry. Rep. 190, (Ill.) 70 N. E. 573; *Chauvin v. Detroit United Ry.*, 2 St. Ry. Rep. 478, (Mich.) 97 N. W. 160; *Richmond Pass. & Power Co. v. Gordon*, 2 St. Ry. Rep. 936, (Va.) 46 S. E. 772; *El Paso Elec. Ry. Co. v. Kendall*, 2 St. Ry. Rep. 910, (Tex. Civ. App.) 78 S. W. 1081; *Binsell v. Interurban St. Ry. Co.*, 2 St. Ry. Rep. 781, 91 App. Div. (N. Y.) 402, 86 N. Y. Supp. 913; *Geleta v. Buffalo & Niagara Falls Elec. Ry.*, 2 St. Ry. Rep. 783, 88 App. Div. (N. Y.) 372, 84 N. Y. Supp. 629; *Goldkranz v. Metropolitan St. Ry. Co.*, 2 St. Ry. Rep. 780, 89 App. Div. (N. Y.) 590, 85 N. Y. Supp. 667; *Pritchard v. Brooklyn Hts. R. Co.*, 2 St. Ry. Rep. 782, 89 App. Div. (N. Y.) 269, 85 N. Y. Supp. 898; *Buren v. St. Louis Transit Co.*, 2 St. Ry. Rep. 616, (Mo. App.) 78 S. W. 680; *Roefeldt v. St. Louis & Sub. Ry. Co.*, 2 St. Ry. Rep. 562, (Mo. Sup.) 79 S. W. 706.

was following was going down the south-bound track very slowly, and about the time Forty-second street was reached the deceased pulled his horse out onto the north-bound track, and either started to go around the wagon he was following or to turn east on Forty-second street, there being a conflict in the evidence as to what he was trying to do, but the evidence shows that about the time he had pulled over onto the north-bound track he pulled back toward the south-bound track, and his wagon was struck by an electric car coming toward him on the north-bound track. White fell from his wagon, and died a short time afterward. Forty-second street intersects Halsted street on the east side, but does not extend west beyond Halsted street, the stockyards being to the west.

The errors urged are the failure of the court to direct a verdict for the appellant, the giving and refusing of instructions, limiting the number of instructions to be given and passed upon by the court, and alleged misconduct of the attorney for appellee in his argument to the jury.

William J. Hynes, James W. Duncan (Mason B. Starring, of counsel), for appellant.

James C. McShane, for appellee.

Opinion by RICKS, J.

1. It is urged that the court should have directed a verdict for appellant because White, plaintiff's intestate, was guilty of contributory negligence as a matter of law. It is contended that there is no evidence that the deceased used ordinary care for his own safety, and that the evidence, taken in the most favorable light to appellee, does not tend to show that the deceased did use ordinary care, but, on the contrary, shows that the deceased's injury resulted from his own negligence. Appellant concedes that it is generally a question of fact whether or not a given line of conduct amounts to the exercise of ordinary care, but takes the position that it is equally well settled that, where there is no conflict in the evidence, and where it can be fairly seen the injury was the result of the negligence of the party injured, the question becomes one of law, and in such case the court should instruct the jury to find for the defendant. In this position appellant insists it is supported by *Beidler v. Branshaw*, 200 Ill. 425, 65 N. E. 1086; *North Chicago Street R. Co. v. Cossar*, 203 Ill. 608, 68 N. E. 88, and in other cases cited in its brief.

The accident occurred in the morning. The sun was shining, but there was some mist. Appellee's contention is that when the

deceased reached the north boundary of Forty-second street he turned his horse in an easterly course, as if to cross Halsted street and go east along Forty-second street, but that there was on the east line of Halsted street another beer wagon loaded with barrel beer that obstructed his way, and, seeing the approaching car of appellant coming from the south, and north bound, the deceased, in order to avoid a collision, turned his horse back toward the west to pass the car on the west side, but that the west track, which was only about five feet from the east track, was occupied, and the speed of the car was so great that before he could reach a place of safety the collision took place. Appellant's contention is that the deceased undertook to pass the wagon loaded with bottled beer, which he had followed on the south-bound track, that was immediately in front of him, and pulled out of Forty-second street for that purpose; that the street, except as to the wagon going south along the west track, was free from obstructions; and that the deceased, in the exercise of ordinary care, should have seen the approaching car, and have refrained from turning out on to or near to the east track until the car had passed.

There is some conflict in the evidence as to where the deceased did leave the west track — whether at the north boundary or north curb of Forty-second street or about the middle of Forty-second street. Witnesses for appellee testified that the deceased left the track at the north boundary, or at the curb of Forty-second street, and that the collision took place about the middle of the street, while other witnesses testified that the deceased left the west track about the middle of the street, and that the collision took place near the south curb. There is no conflict in the evidence but that the car, when the deceased did pull into the street, was between 100 and 200 feet south of him. There is a conflict in the evidence as to the speed of the car, but there is testimony tending to show that the speed of the car was about twelve miles an hour when the collision took place. In considering this question we are bound to take the testimony most favorable to appellee. The evidence most favorable to him tends to show that the deceased turned out of the west track at the north boundary of Forty-second street, and that at that time the car was 200 feet away,

and was traveling at the rate of twelve miles an hour, and that its speed was not perceptibly slackened until almost the moment of the collision. There is also evidence tending to show that the bell was not rung or gong sounded, and while there is evidence that shows that the motorman, and perhaps others, by calling to and by gesticulation sought to warn the deceased, there is no evidence that he was conscious of such warning. The evidence as to what course the deceased intended to pursue at the time he did pull out of the west track is only inferential, there being no evidence showing where he was going, or what for. His place of work was at 4824 Halsted street, or a little more than six blocks directly south of where he received his injuries, and at that time he was going south toward his headquarters, with his wagon empty.

We have for several years denied the contention that the failure to look and listen when approaching a railroad crossing was, as a matter of law, negligence, and have in recent years uniformly held that whether such failure was negligence was a question of fact, to be determined from all the facts and circumstances in the case. If, then, it was not negligence, as a matter of law, for the deceased to have changed his course at the street crossing and have turned out toward or upon the east track without looking and listening for a north-bound car, we are unable to say that, as a matter of law, the deceased was guilty of negligence in doing so when it appears that the car was 200 feet away from him, approaching a street crossing, and in the absence of evidence that he had any knowledge that such car was approaching. Appellant puts the question thus: "The sole question then arises, was his conduct in turning to the left upon the track, where he might come face to face with an approaching car, contributory negligence?" and we answer, "As a matter of law, no; as a matter of fact, it may have been." But to say that in a city, at the crossings of streets, every person in a conveyance who may veer from his course is guilty of negligence or want of ordinary care because he may come face to face with an approaching car and may incur an injury, is to say that, as a matter of law, every person driving along a street must take one course, and not deviate from it, at the risk of receiving injury for which he shall

have no compensation under any circumstances. The beer wagon that was in front of the deceased when driving down the west track continued in its course, and when the injury occurred the two wagons were practically side by side, and whether it was the duty of the deceased, in the exercise of ordinary care, to have seen the approaching car 200 feet away at or before the time he pulled out of the west track, and have apprehended the danger of a collision, and have remained on the west track, or to have endeavored to have gone on east, down Forty-second street, or turned back into the west track behind the wagon he had been following, or whether he might not, in the exercise of ordinary care, rely upon appellant so keeping its car in control in approaching the street crossing, and in the 200 feet it had to travel, that the same might be easily and safely stopped and collision avoided, were questions of fact, which we think were properly referable to the jury. Appellant concedes that the evidence tends to show negligence on its part. It was not error to refuse to direct a verdict of not guilty.

2. Complaint is made of appellee's instruction No. 20. The instruction reads: "The court instructs the jury that 'ordinary care,' as mentioned in these instructions, is the degree of care which an ordinarily prudent person situated as the deceased was, as shown by the evidence, before and at the time of the injury, would usually exercise for his own safety." It is said of this instruction that it confines the definition of ordinary care to the plaintiff's intestate, and, as other instructions referred to the care of appellant as well, the definition should have been broad enough to include both. It was not improper for the court to define to the jury the meaning of the term "ordinary care" as applied to the conduct of either of the parties. Appellant was urging contributory negligence as a substantive defense, and appellee was entitled to an instruction as to the line of conduct required of the deceased to show care on his part. The greater insistence of appellant is that the instruction is too narrow, and does not, in terms, submit the proposition that plaintiff's intestate must have exercised ordinary care in leaving the west track, and assumes that an ordinarily prudent person would be situated as the deceased was situated before and at the time of the accident;

that the central inquiry was, not what the deceased did after getting into the situation, but was he in the exercise of ordinary care in getting himself into that situation; that, although the words "before and at the time of" are in the instruction, the jury were warranted in construing it to mean that the appellee might recover if, after leaving the west track, his intestate exercised the care an ordinarily prudent person would usually exercise. In support of this contention appellant cites *North Chicago Street R. Co. v. Cossar*, 203 Ill. 608, 68 N. E. 88; *Illinois Central R. Co. v. Weldon*, 52 Ill. 290, and *Illinois Central R. Co. v. Creighton*, 53 Ill. App. 45. In the *Cossar* case time was not an element of the instruction complained of, but "the circumstance and in the situation" were to be the criteria, and we expressed the view that under it no time or circumstance, except that directly attendant upon the immediate accident, was included in its terms, and that it was too narrow, as it excluded the requirement that the plaintiff should not negligently place herself in a position of danger. In the *Weldon* case, *supra*, the instruction is not set out. The court say the instructions were confined to the conduct of the deceased whilst unloading the coal cars, during which he received his injuries, but that the central question was, did he exercise proper care and caution in entering the car under the circumstances, and that the latter question should have been submitted. In the *Creighton* case, *supra*, the instruction was, "At the time of such alleged injuries exercising due care." The injury was caused in an effort of the plaintiff, an engineer, to reverse the lever on a locomotive and avert a wreck. The evidence tended to show that the difficulty in reversing the lever arose from the plaintiff having two days previously plugged certain holes in the cylinder in such manner that the lever could only be moved by great effort. The defense was contributory negligence. It was held that the instruction confining the due care to the time of the injury was too narrow, as it authorized the jury to find for the plaintiff if using due care at the time, although the injury may have been due to his gross negligence two days before. All that occurred in the case at bar from the time the deceased reached Forty-second street to the time of the accident could not have exceeded two or

three minutes, and the instruction required due care before and at the time of the injury, and we think was broad enough, and did not assume, as is contended, that the deceased was in the exercise of due care at any time.

The appellant's fourth instruction told the jury that White, the deceased, and appellant, were required to use the same degree of care to avoid the injury, and by appellant's eighth instruction the jury were told that if White was negligent and careless in driving his wagon at the time and place in question, and that such negligence caused his injury, appellee could not recover.

Appellant's instruction No. 12 was refused. It was as follows:

"If the jury believe, from the evidence, that ordinary care on the part of White for his own safety required him, before driving to or upon the track parallel with the track upon which he had been driving, at the time and place in question and under all the circumstances in evidence, to look and ascertain whether or not a car was approaching along the north-bound track, and not to drive upon said track without so looking; and if the jury believe, from the evidence, that White, if he had looked, could, by the exercise of ordinary care, have ascertained whether or not a car was approaching along the said north-bound track; and if the jury further believe from the evidence that White did not so look and ascertain whether or not the car was so approaching, and that he was injured in consequence and because of his failure, if he did so fail to look and ascertain — then the court instructs the jury to find the defendant not guilty."

Appellee says this instruction was properly refused, because it assumes that, if plaintiff's intestate saw the car approaching, he should, in no event, have driven upon the track; that it emphasized the question of his looking or failing to look; and that it was covered by other general instructions requiring him to exercise ordinary care to avoid the injury. We do not think any of the suggestions made justify its refusal. It assumes no fact, but submits the question as one of fact, to be determined from the evidence, whether plaintiff's intestate, in the exercise of ordinary care, should have looked for the car before turning out, and whether he did look; and then states that if he should have looked, and did not look, and was injured in consequence of his failure to do so, the jury should find the appellant not guilty. There was no other instruction that contained the proposition here presented, except instructions of a general character. The matter there presented was the chief ground of de-

fense, and should have been submitted by the instruction offered. *Mallen v. Waldowski*, 203 Ill. 87, 67 N. E. 409; *Chicago, Burlington & Quincy R. Co. v. Camper*, 199 Ill. 569, 65 N. E. 448; *Chicago & Eastern Illinois R. Co. v. Storment*, 190 Ill. 42, 60 N. E. 104.

The court refused appellant's instruction No. 13, which was as follows:

"The issues you are sworn to try in this case are as follows: Was the electric car which collided with the wagon in question carelessly and improperly driven or managed by the servant or servants of the defendant? Was the said electric car traveling at an unnecessarily high or dangerous rate of speed? Did the servant or servants of defendant negligently fail to ring a gong or bell at the time and place in question? Did the servant or servants of defendant in charge of said car know that White was in a position of peril in time to have stopped the car in time to have avoided the collision by the use of reasonable care on their part? Could the servant or servants of defendant in charge of the electric car, by the use of reasonable care, have seen that White was in a position of peril in time to have stopped the said car before the collision? Was White at and just before the time of the collision using ordinary care and caution for his own safety? If you conclude that the greater weight of the evidence does not show that White was using such care and caution for his own safety, you need not concern yourselves with the other issues, because in no event can the plaintiff be entitled to recover a verdict unless it has been shown by the greater weight of the evidence that such care and caution was used by White. If you do find from the greater weight of the evidence that such care and caution was used by White, you will examine the evidence bearing upon the other issues, and if you do not find the greater weight of the evidence, taken as a whole, will warrant you in answering one or more of them in the affirmative, you should find the defendant not guilty."

And the court gave appellant's instruction No. 18, as follows:

"The jury are instructed that the plaintiff cannot recover at all in this case against the defendant company unless the jury believe that the plaintiff has proved, by a preponderance of the evidence, the following propositions: First, that the plaintiff's intestate was exercising ordinary care for his own safety at and just prior to the time of the accident in question; second, that the defendant company was guilty of negligence in the manner charged in the declaration; and, third, that such negligence was the proximate, direct cause of the death of the plaintiff's intestate. And if you find from the evidence that the plaintiff has failed so to prove these propositions as stated, or that he has failed so to prove any one of them, he cannot recover against said defendant company, and you should find the defendant company not guilty."

Appellee claims that by giving appellant's instruction No. 13, and other general instructions, the errors, if any, in refusing No. 13, were cured. Appellee further contends that instruction No. 13 ignores the charge in the declaration that appellant did not maintain a proper lookout; that the direction by the next to the last clause of the instruction refused, that the jury need not consider the other matters if they found the appellee's intestate was not in the exercise of due care and caution, ignored the question of the appellant's gross negligence, which the *narr.* was broad enough to cover, and there was evidence tending to support. As to the latter claim, we will not enter into a discussion, but will only say we think there was no evidence tending to support the charge of gross negligence on the part of appellant, and no instruction was asked by appellee upon the theory that there was. Under the fourth and fifth clauses the question of a proper lookout was included. The instruction was not subject to objection as to form or substance, and fairly stated the issues under the declaration, and, unless covered by other instructions, should have been given.

Instruction No. 13 was presented among the fifteen to which the court had limited each side, and after it was refused, appellant offered three more instructions, numbered 16, 17, and 18, together with written suggestions why the court should consider the same, and 16 and 18 were given and 17 refused. Appellee only offered six instructions, and they were 19 to 24, inclusive, and were all given. By appellee's instruction No. 19, the jury were told that if White, in the exercise of ordinary care, was killed by or in consequence of the negligence of the defendant, as charged in the declaration, they should find the defendant guilty. The jury were thus to learn, as best they could, and determine for themselves, so far as the plaintiff was concerned, what actionable negligence was charged in the declaration; and the appellant, with such instruction given for appellee, was entitled to have the jury fairly and fully informed what negligence was charged in the declaration, and what acts or omissions of the defendant must be found to authorize the verdict of guilty. *North Chicago Street R. Co. v. Polkey*, 203 Ill. 225, 67 N. E. 793; *Illinois Central R. Co. v.*

King, 179 Ill. 91, 53 N. E. 552, 70 Am. St. Rep. 93; *West Chicago Street R. Co. v. Kautz*, 89 Ill. App. 309. In the latter case the judgment of the trial court was reversed for failure to give an instruction almost identical with appellant's No. 13. We do not think the instructions given covered the issues in the case.

Appellant's ninth instruction began with the statement, "The court instructs the jury that White had no right to drive upon the railway track in question so as to obstruct or unnecessarily interfere with the passage of the defendant's cars." There was no evidence in the record tending to show White sought to obstruct or unnecessarily interfere with the passage of appellant's cars. The instruction assumed either the fact, or that there was evidence tending to support the statement. What followed in the instruction did not relieve it from such vice, and the court properly refused it.

Appellant's seventeenth instruction was refused. The court declined to examine or pass upon it, as it was in excess of the limit as to the number which the court had fixed. The material parts of it were covered by appellant's instructions Nos. 2, 4, and 5, and its refusal was not error.

Complaint is made of the modification of some of appellant's instructions, but we do not find the modifications such as should be held to be error.

3. It is claimed by appellant that it was prejudiced by the manner and language of the court while fixing and enforcing the rule limiting the number of instructions. At the close of the plaintiff's case the court openly announced the rule limiting the total number of instructions to thirty, allowing fifteen to each side, and stated no more would be received and considered. When appellant offered its instructions there were eighteen, and the court insisted that counsel should select fifteen of them to be passed upon; and it is claimed that in the colloquy between the court and counsel the court was gruff and arbitrary, and so spoke that the jury might infer that appellant was seeking both an unfair and illegal advantage. The language of the court is included in the bill and briefs, and is followed by the statement that it is doubtful if the jury heard what transpired. The manner of the

court, more than the language, is complained of. The court was not authorized to arbitrarily fix the number of instructions that should be presented or passed upon. *Chicago City Ry. Co. v. Sandusky*, 198 Ill. 400, 64 N. E. 990. By fixing the rule appellant was not injured, as all its instructions presented (and there were eighteen) were considered and passed upon but one — No. 17. It would have been proper to have refused it when considered. We cannot say whether the jury observed or heard what transpired as to the instructions, or what effect it had, if any, on the jury. It cannot be maintained that it was the proper thing for the court to establish an illegal rule, and become angry and show his displeasure because it was not acquiesced in.

4. The argument of counsel for appellee, in some of its features, was strenuously objected to by appellant, and the remarks were mostly withdrawn, and the objection sustained. To say the least, some of the remarks should not have been made, and we may hope will not be repeated upon the further trial for which this cause will be remanded to the Superior Court.

The judgments of the Superior Court and the Appellate Court will be reversed.

Reversed and remanded.

Chicago City Railway Co. v. Barker.

(Illinois — Supreme Court.)

1. COLLISION WITH VEHICLE; DUTY TO LOOK AND LISTEN.—The plaintiff's wagon which he was driving along the tracks of the defendant was struck by a sprinkling car running upon the defendant's tracks, and he was thrown from the wagon and seriously injured. It appeared that the car had been in charge of a single motorman, but such motorman had fallen from the car, and it was running wild at the time of the accident. The evidence was conflicting as to whether the plaintiff's intestate stopped and looked before driving upon the track. It was held that it was for the jury to decide such question; and that even

1. Duty to look and listen.— See cases cited in note to preceding case.

if the intestate did not stop and look back before crossing the track. it was not negligence *per se*, and it was for the jury to determine whether the failure to so stop and look is or is not negligence.

2. APPLICATION OF DOCTRINE OF RES IPSA LOQUITUR.²—The meaning of the maxim *res ipsa loquitur* is that, while negligence is not, as a general rule, to be presumed, yet the injury may afford sufficient *prima facie* evidence of negligence and the presumption of negligence may be created by the circumstances under which the injury occurred. This maxim is applicable, and a presumption of negligence on the part of the defendant arises where it appears that the car which struck the wagon of the plaintiff's intestate was being run without a motorman.
3. REBUTTAL OF PRESUMPTION.—It appears from the testimony of the motorman that he fell from the car because of an electric shock received by him while operating such car. Other testimony tended to show that the motorman was not negligent in the performance of his duty. It was held that the question as to whether the defendant's evidence sufficiently rebutted the presumption of negligence was one of fact for the jury.
4. DECLARATION AS TO NEGLIGENCE.—A declaration charging that the defendant "carelessly, negligently, and wrongfully ran and managed its car," is sufficiently general in its terms to permit the plaintiff to rely on the presumption of negligence.

APPEAL by defendant from a judgment of the Appellate Court conditionally affirming a judgment for the plaintiff. Decided April 20, 1904. Reported 209 Ill. 321, 70 N. E. 624.

Statement of facts by MAGRUDER, J.

This is an action on the case, brought on August 23, 1900, in the Superior Court of Cook county, to recover damages for personal injuries claimed to

2. Presumption as to negligence.—Where an injury is occasioned by a collision of a street car with a vehicle driven along street car tracks the doctrine of *res ipsa loquitur* will not usually apply, but even in such cases the circumstances under which the injury occurred may be such as to create the presumption of negligence and give rise to the application of such doctrine. For instance, in an action against a street railway company the plaintiff's evidence showed that his wagon was standing on one of the defendant's tracks, and that in front of him were two cars, and that, as the second car moved up a grade, the trolley wheel slipped and the car slipped backward and struck the car back of it, when either the force of the collision drove the rear car against the wagon, or the motorman of that car moved it backward to avoid a collision; it was held that the evidence raised a presumption of negligence on the part of the defendant, and made it incumbent on him to show due care. *Campbell v. Consolidated Traction Co.*, 201 Pa. St. 167, 50 Atl. 829. As to presumption of negligence imposing upon the defendant the burden of proving that the injury occurred without negligence upon its part or upon the part of its employees, see *Nellis Street Railroad Accident Law*, p. 570.

have been suffered by John Eick in consequence of a collision between one of appellant's electric sprinkling cars and a wagon in which Eick was driving. The declaration, as originally filed, consisted of two counts, to which the general issue was pleaded. Subsequently the plaintiff discontinued his action as to the first count, and the cause went to trial before the jury upon the issue tendered by the second count. The jury returned a verdict of guilty, and assessed the plaintiff's damages at \$5,000, and judgment was entered on the verdict. From this judgment the appellant prosecuted its appeal to the Appellate Court, and there, upon the requirement of a remittitur of \$1,500, which was entered, the Appellate Court entered judgment for the plaintiff in the sum of \$3,500. The present appeal is prosecuted from the judgment so entered by the Appellate Court. The suit was originally begun in the name of John Eick, but, during the pendency of the appeal from the Appellate Court to this court, Eick died intestate, and the present appellee, having obtained letters of administration upon his estate, has been substituted as appellee.

The second count of the declaration alleges that on or about May 14, 1900, in Chicago, the defendant below (appellant here) was owning, controlling, and operating a street railway extending upon and along a certain public highway, to wit, West Forty-seventh street, and on said street railway was owning, controlling, and operating a certain electric sprinkling car, and then and there said car was proceeding in a westerly direction toward and near the crossing of said West Forty-seventh street with a certain other public highway, to wit, South Oakley avenue, and plaintiff was then and there riding, as he had a right to do, on a certain wagon on West Forty-seventh street, and proceeding in a westerly direction some distance in front of said car, and was in the exercise of due care and diligence, and then and there the defendant so carelessly, negligently, and wrongfully ran and managed the said street railway car that, by and through the carelessness, negligence, and mismanagement of the defendant, said car then and there ran from behind against and into the plaintiff's wagon, on which he was then and there riding as aforesaid, and with great force and violence then and there threw and knocked the plaintiff from and off the said wagon to and upon the ground there, by means whereof, etc.

The facts are substantially as follows: Forty-seventh street runs east and west, and appellant has a double-track street railway thereon. The east-bound cars are run over the south track, and the west-bound cars over the north track. About a block east of Oakley avenue appellant's tracks on Forty-seventh street are crossed from southeast to northwest by what are known as the "Panhandle Railroad Tracks," the distance across which at this point is about 100 feet. On May 14, 1900, Eick was riding west upon Forty-seventh street in a covered wagon, drawn by one horse, upon the north or west-bound track of appellant's railway. There appears to have been upon this track at that time repair work going on at the railroad crossing, and there were piles of material upon the crossing, which made it necessary to use the south or east-bound side of the street to cross the rail-

road tracks going either way. Upon reaching the Panhandle crossing, Eick stopped, waited for a freight train to pass, then drove over the tracks of the steam railroad south of appellant's tracks because of the obstruction aforesaid, and, when he had passed the crossing, turned back into the north track. After Eick had proceeded forty or fifty feet in the north or west-bound track, his wagon was suddenly struck in the rear by the sprinkling car. This sprinkling car was a tank about three feet high, and set on ordinary street-car wheels, and was not as high as a man's head. The car was an electric-motor sprinkler, carrying a water tank, and had been in charge of a single motorman. Before Eick went upon the north track, the sprinkler was east of the railroad tracks, and about 150 yards in his rear. The sprinkler, coming from the east toward the west, was running wildly, with no one in charge of it, and struck Eick's wagon from behind, so that the horse and wagon were forced to one side, and Eick was thrown out of the wagon. The car was stopped a short distance farther on at Oakley avenue by a man who jumped upon the same and disengaged the trolley. At a point about 150 yards east of the Panhandle crossing, the motorman who had been in charge of the sprinkling car fell or was knocked off from the same, and, as soon as he fell, jumped up and attempted to catch the trolley rope, so as to stop the car, but he failed in his attempt, and the car passed on until it struck Eick's wagon.

Mason B. Starring, for appellant.

Richolson & Levy (C. Stuart Beattie, of counsel), for appellee.

Opinion by MAGRUDER, J.

At the close of all the evidence the appellant requested the court to give an instruction, directing the jury to find the defendant not guilty, and it is the contention of the appellant that the trial court erred in refusing this instruction. It is claimed by the appellant "that there was no evidence to sustain the verdict of the jury as to the issue, either of the appellant's negligence, or of ordinary care on the part of appellee." The question which concerns this court is, not whether there was any evidence to sustain the issues involved, but whether there was any evidence tending to establish the cause of action in the case.

1. It is said that Eick did not exercise ordinary care for his own safety. There is evidence tending to show that he did exercise such care. When he turned, after passing the steam railroad crossing from appellant's south track into the north track, he swears that he looked back to the rear, or east, and did not see

the sprinkling car. It is true that the wagon in which he was riding was a covered wagon, but he stated that he stretched himself out to one side and looked back. It is not evidence of negligence *per se* that a person does not stop and look back before crossing the track of a railroad, and it is a question for the jury to say whether the failure to so stop and look is or is not negligence. *Chicago City Ry. Co. v. Fennimore*, 199 Ill. 9, 64 N. E. 985. In the case at bar the testimony of Eick shows that he did look, and that, as a result of his look, he saw nothing approaching in his rear. The argument of the appellant is that his evidence upon this subject was not true, because, under the circumstances, if he had looked, he must have seen the sprinkler approaching. This argument involves a discussion of the facts, which is inappropriate before this court, except so far as it is necessary to determine whether or not the evidence tends to sustain the cause of action. *Chicago City Ry. Co. v. Martensen*, 198 Ill. 511, 64 N. E. 1017. It was a question for the jury to decide, from all the circumstances in the case, whether or not the testimony of Eick was true. The testimony is clear and positive on his part that he did look, but whether he looked in such a way as to show that he thereby exercised ordinary care for his own safety or not was a matter entirely within the province of the jury to determine. The only ground upon which appellant seeks to show that Eick was not exercising ordinary care is the alleged untruthfulness of his testimony that he looked to see what was behind him. This being so, we are not prepared to say that there was no evidence tending to show that he exercised ordinary care.

2. This is a case for the application of the doctrine *res ipsa loquitur*. While Eick was riding west in his wagon upon the north side of the street, as he had a right to do, an electric motor car belonging to, and under the management of, appellant, and used for sprinkling purposes, with no motorman or any other person upon it or in control of it, ran up from the rear and struck Eick's wagon, and threw him out upon the ground, and inflicted the injuries for which this suit is brought. This collision gives rise to a presumption of negligence on the part of the appellant, and the burden of proof was upon the appellant to rebut that presumption. The meaning of the maxim *res ipsa*

loquitur is that, while negligence is not, as a general rule, to be presumed, yet the injury itself may afford sufficient *prima facie* evidence of negligence, and the presumption of negligence may be created by the circumstances under which the injury occurred. "Where negligence is thus presumed from the occurrence of the injury, defendant is called upon to rebut the *prima facie* case by showing that he took reasonable care to prevent the happening of such injury." *Hart v. Washington Park Club*, 157 Ill. 9, 41 N. E. 620, 29 L. R. A. 492, 48 Am. St. Rep. 298. In *Hart v. Washington Park Club*, *supra*, quoting from *Scott v. Docks Co.*, 3 Hurl. & C. 596, it was said:

"There must be reasonable evidence of negligence. But when the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

North Chicago Street Ry. Co. v. Cotton, 140 Ill. 486, 29 N. E. 899. In the same case, quoting from *Addison Torts* (vol. 1, § 33), the rule was thus stated:

"Where the accident is one which would not, in all probability, happen if the person causing it was using due care, and the actual machine causing the accident is solely under the management of the defendant, * * * the mere occurrence of the accident is sufficient *prima facie* proof of negligence to impose upon the defendant the onus of rebutting it."

There is no doubt here from the evidence that this electric sprinkling car which caused the accident was under the management and control of the appellant. When it was about 150 yards in the rear and east of the point where Eick's wagon turned to go upon the north track, the motorman in charge of the sprinkling car fell from it to the ground. He was the only person who at the time was upon the car, which had one platform in the rear and one platform in front. At the time when the motorman, whose name was Foley, fell from the sprinkling car, he had one hand on the brake handle of the car and the other hand on the barrel tank, but without apparently holding on to anything. While in this position he turned to look back and says that when he did so he received a shock which threw him from the car. His

testimony is, in part: "I don't know whether I was looking back to see whether there were kids, or what was the matter. I put one hand on the brake handle, and I think I was looking back to see whether there was any water going out of the tank, * * * and the other back on the barrel, and I looked back over the tank; and at that instant, when I put back my hand, I got a shock and fell off involuntarily." It is evident that the motorman received no serious or long-continued injury from the shock, because his own testimony shows that, as soon as he struck the ground, he jumped up and ran after the sprinkler, and attempted to loosen the trolley wire. He says: "I jumped up the moment I fell. I got up as quick as I could, and made one jump to see if I could catch the trolley rope. I failed to get that."

It was for the jury to say whether the motorman fell from the car on account of an electric shock which, he says, he received, or whether he fell off as the result of his own conduct in looking back over the barrel without securing a sufficient hold upon some part of the car to prevent himself from falling off. Whether his statement was true—that an electric shock was the cause of his fall—was a matter to be determined by the jury. The testimony introduced by the appellant was to the effect that there was no way in which the electric apparatus could cause such a shock; that no person had ever heard of such an accident before; that the witness had run the car for three weeks, and during all the morning of that day, without any accident, the accident having occurred about 1 o'clock; that the car was of the best and highest standard of construction; that it was inspected by expert workmen every night; and that any repairs which were needed were promptly made.

The contention of the appellant is that, if it was necessary for it to rebut the *prima facie* presumption of negligence raised by the occurrence of the accident in the manner stated, it did so by showing that the motorman was thrown from the car by an electric shock which the appellant was unable to anticipate or prevent, and that, therefore, it should not be held responsible because the car was not in the control of any one when it struck Eick's wagon. It was a question for the jury to determine whether the explanation of the accident sufficiently rebutted the

presumption in question. The credibility of such rebutting evidence is held by the authorities to be a question for the jury. *Ugla v. West End Street Ry. Co.*, 160 Mass. 351, 35 N. E. 1126, 39 Am. St. Rep. 481; *O'Flaherty v. Nassau Electric Ry. Co.* (Sup.), 54 N. Y. Supp. 96. In actions brought for damages alleged to result from fire caused by the escape of sparks from locomotive engines, the fact of the communication of the fire to the property destroyed or injured is taken as *prima facie* evidence to charge with negligence the corporation or other person who at the time of the injury is in the use and occupation of the railroad, and in such cases "the question whether the defendant's evidence was sufficient, under all the circumstances, to rebut the *prima facie* proof of negligence arising from the undisputed fact that the fire was communicated from the engine was clearly a question of fact for the jury, and as to which the judgment of the Appellate Court is conclusive." *Louisville, Evansville & St. Louis Consol. R. Co. v. Spencer*, 149 Ill. 97, 36 N. E. 91; *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Hornsby*, 202 Ill. 138, 66 N. E. 1052. As is said by the Appellate Court in their opinion deciding this case:

"In the case at bar, it was for the jury to consider whether the explanation offered by appellant relieved it from the presumption of negligence raised by the undisputed facts. If appellant ran its car in an unsafe condition, evidence tending to show such condition was admissible under the second count."

It is said, however, on the part of the appellant, that the declaration in this case charged specific acts of negligence, and that, therefore, Eick was not entitled to rely upon presumptive negligence. The cases of *West Chicago Street R. Co. v. Martin*, 154 Ill. 523, 39 N. E. 140, and *Chicago & Eastern Illinois R. Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921, are relied upon in support of this position. But the facts of the latter cases, when carefully examined, will show that they have no application to the case at bar. The declaration here charges that the appellant "carelessly, negligently, and wrongfully ran and managed its car." If the appellant placed the sprinkling car under the control of a motor-man, who lost control of it by his own carelessness, then the sprinkling car was not properly run and managed by the appel-

lant. We think that the declaration is sufficiently general in its terms to take the case at bar out of the rule announced in the cases last referred to. The second count of the declaration here does not charge that any servant of the appellant was guilty of specific acts of negligence, but charges that the appellant itself carelessly ran and managed its electric sprinkling car. The second count of the declaration does not state in or by what specific acts the carelessness in driving or managing the car was manifested—whether by running at a greater rate of speed than safety or prudence required, or by improper and insufficient exercise of control on the part of the motorman, or by some other means. “Carelessness and impropriety are not descriptive of specific acts, but of a class of acts only, which may include an indefinite number of specific acts, each differing in its character from the others.” *Chicago, Burlington & Quincy R. Co. v. Harwood*, 90 Ill. 425.

We are of the opinion that there was sufficient evidence tending to show that the appellant was guilty of such negligence as caused the injury to justify a submission of the question of negligence to the jury.

Accordingly the judgment of the Appellate Court is affirmed. Judgment affirmed.

Chicago Union Traction Co. v. Chugren.

(Illinois—Supreme Court.)

1. COLLISION WITH LOADED WAGON;¹ INSTRUCTION AS TO CONTRIBUTORY NEGLIGENCE.—The plaintiff in attempting to drive his team, hauling a wagon heavily loaded, across the tracks of the defendant was thrown to the ground and injured by a collision of an electric car with his wagon. The court instructed the jury that the ordinary care required of the plaintiff in driving across the track was that “care and foresight to avoid danger which a person of ordinary prudence, caution, and intelligence would usually exercise under the same or similar circumstances.” It was held that such instruction was correct and could not be objected to because of the use of the word “usually.”

1. See cases cited in note to *Chicago City Railway v. O'Donnell*, *ante*, page 170.

2. INSTRUCTION AS TO RECOVERY OF DAMAGES FOR FUTURE PAIN OR SUFFERING.—Where evidence for the plaintiff tended to show that his left shoulder was dislocated; that there was a fracture of the bones of the nose and a cut over the left eye; that for more than a year and a half after the accident the left arm could not be raised above a horizontal line, that the natural motion was limited, and an attempt to raise the arm higher caused pain, and that the vision of the right eye was materially affected and diminished, and that such defective eyesight was permanent and likely to grow worse, an instruction permitting the jury to take into consideration any future pain or suffering or future inability to labor or transact business was not erroneous.

APPEAL by defendant from judgment of Appellate Court affirming a judgment for the plaintiff. Decided April 20, 1904. Reported 209 Ill. 429, 70 N. E. 573.

John A. Rose and Louis Boisot (W. W. Gurley, of counsel), for appellant.

Castle, Williams & Smith (Ben M. Smith, of counsel), for appellee.

Opinion by CARTWRIGHT, J.

This is an appeal from a judgment of the Appellate Court for the First District affirming a judgment of the Superior Court of Cook county in favor of appellee against appellant for damages resulting from a collision of an electric car of appellant and a wagon loaded with timothy seed, on which appellee was riding and driving the team hauling the same across the tracks of appellant, by which he was thrown to the ground and injured. The errors assigned consist in giving two instructions to the jury at the request of the plaintiff.

The first instruction related to the assessment of damages in case the plaintiff should recover, and authorized the jury to take into consideration any future pain or suffering or future inability to labor or transact business, if any, that the jury might believe, from the evidence, the plaintiff would sustain by reason of the injuries received. The objection is that it permitted a recovery of damages for an element of injury which there was no evidence tending to prove was reasonably certain to occur. The allegations of the declaration were sufficient to admit proof of a permanent injury. The evidence showed that, as a result

of the collision, the left shoulder of the plaintiff was dislocated, and there was a fracture of the bones of the nose and a cut over the right eye, extending across it and exposing the bone. The evidence of the plaintiff was that at the time of the trial — more than a year and a half after the accident — the left arm could not be raised above the horizontal line; that the natural motion was limited, and an attempt to raise the arm higher than a horizontal line caused pain; that the vision of the right eye was affected and diminished to the extent of one-fourth to one-third, and that the defective eyesight was permanent and likely to grow worse. This testimony tended to show that there was some permanent injury which would affect the ability of the plaintiff to labor, and that the future damages mentioned in the instruction were reasonably certain to result. On the other hand, there was evidence that at the time of the trial plaintiff was still a teamster, and was earning the same wages as before the accident. This evidence was proper to be considered by the jury on the question of future damage, but it was not error to give the instruction based on the evidence for the plaintiff.

The second instruction was devoted to the subject of contributory negligence and the degree of care required of the plaintiff, and the objection to it is that in fixing the standard of ordinary care it was stated to be that care and foresight to avoid danger which a person of ordinary prudence, caution, and intelligence would usually exercise under the same or similar circumstances. Counsel say that the word "usually" had no proper place in the instruction; that plaintiff was required by law to exercise such care as a person of ordinary prudence would exercise under the same or like circumstances; that a person possessed of ordinary prudence, caution, and intelligence may exercise great care sometimes and at other times no care at all, and that when exercising no care he is not acting as a person of ordinary prudence. Counsel also objected to the instruction as limiting the care required of the plaintiff to the time of the accident. The instruction includes the endeavor or attempt of the plaintiff to cross over the tracks of the defendant and also the time while on the tracks, which covers the whole period of the occurrence, and it is not limited to the time of the accident. It is true that men who are

generally prudent and cautious are sometimes careless or inattentive to danger, and that the standard of ordinary care is to be determined from what prudent men generally or ordinarily do, and not on occasions where there may be a lapse from their usual habit of care. The jury are to determine what a reasonably prudent man would ordinarily do in a given state of circumstances. We think the instruction is not subject to the criticism offered, but that it conforms to the rule contended for by counsel.

Appellee moves the court to assess damages against the appellant on the ground that the appeal was prosecuted merely for delay. We cannot say that the appeal was taken for that purpose, and not in good faith, and the motion is denied.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

Boyd v. Logansport, Rochester & Northern Traction Co.

(Indiana — Supreme Court.)

EMINENT DOMAIN.¹—The right of a traction company to exercise the power of eminent domain is a question to be determined in the condemnation proceedings; a party aggrieved by an erroneous ruling by a court as to the right of such a company to take land by condemnation is not entitled to an injunction, but his remedy is by appeal from the ruling, if authorized by statute, if not, from the final judgment when the entire proceeding may be reviewed.

EMINENT DOMAIN AS APPLIED TO STREET RAILWAYS.

1. Right of eminent domain.
 - a. In general.
 - b. Exercise of right.
2. Necessity of appropriation.
3. Effect of location of line.
4. Exercise of power by de facto corporation.
5. Determination of right to acquire by condemnation.
6. Injunction to prevent condemnation.

1. Right of eminent domain. a. In general.—The right of eminent domain, that is, "the sovereign power, vested in the State to take private property for public use, providing first a just compensation therefor" (Trenton Cut-Off R. Co. v. Newton, etc., Ry. Co., 8 Pa. Dist. R. 549) exists primarily in the

APPEAL by plaintiff from a judgment for defendants. Decided January 5, 1904. Reported (Ind.), 69 N. E. 398.

Lairy & Mahoney and *Nelson & Myers*, for appellant.

A. W. Brady, Holman & Stephenson, and *McConnell, Jenkins & Jenkins*, for appellees.

Opinion by MONKS, J.

This action was brought by appellant to enjoin appellees from constructing the traction company's road on a strip of land belonging to appellant described in the complaint, for the appro-

State, but is nevertheless dormant until called into exercise by an act of the Legislature. Until a statute authorizes the exercise of the power, it is latent and potential merely and not active and efficient, and the State can neither exercise the prerogative nor can it delegate its exercise except through the medium of legislation. *Matter of Poughkeepsie Bridge Co.*, 108 N. Y. 483, 15 N. E. 601; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; *Atkinson v. Marietta & C. R. Co.*, 15 Ohio St. 21.

b. *Exercise of right.*—The power to acquire by condemnation may be exercised either directly by the agents of the government or through the medium of corporate bodies or of individual enterprise. *Beekman v. Saratoga & S. R. Co.*, 3 Paige (N. Y.), 45, 22 Am. Dec. 679; *Ash v. Cummings*, 50 N. H. 591. The Legislature may delegate the power to a railroad company. *Weir v. St. Paul, etc., R. Co.*, 18 Minn. 155; *Warren v. St. Paul, etc., R. Co.*, 18 Minn. 384; *National Docks Ry. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *Bloodgood v. Mohawk & H. R. Co.*, 18 Wend. (N. Y.) 9, 31 Am. Dec. 313. But the property taken must be devoted to a public use. *Loughbridge v. Harris*, 42 Ga. 500; *Nesbit v. Trumbo*, 39 Ill. 110, 89 Am. Dec. 290; *Bennett v. Boyle*, 40 Barb. (N. Y.) 551. Necessity and a public use must in all cases exist as a condition precedent to the legal right of a railway company to enforce a charter right to condemn property. *Tracy v. Elizabethtown, etc., R. Co.*, 80 Ky. 259.

The use of a street railroad which lays its track on the surface of a street pavement is an application to a public purpose. *People v. Kerr*, 27 N. Y. 188; *Toledo Elec. St. Ry. Co. v. Toledo Consol. St. Ry. Co.*, 11 Ohio Dec. 365; *Ogden City Ry. Co. v. Ogden City*, 7 Utah, 207, 26 Pac. 288.

2. *Necessity of appropriation.*—Under a statute providing that when it is necessary for the construction of a street railroad, or for the necessary sidings, to take or damage private property, the same may be done and the compensation therefor made, as provided by law in eminent domain proceedings, a street railroad company cannot take private property for a right of way, although an ordinance of a city authorizes it to lay its tracks on the streets thereof over a part of its route, and over private property as to the balance thereof, since

priation of which as a right of way proceedings had been brought by said traction company in the Cass Circuit Court, under the Act of 1901 (Acts 1901, pp. 461-466, chap. 207). The complaint was in two paragraphs. Appellees' separate demurrer for want of facts to each paragraph of the complaint was sustained, and, appellant refusing to plead further, judgment was rendered in favor of appellees. The errors assigned call in question the action of the court in sustaining said demurrer.

It appears from the complaint that appellee company, claiming to be a corporation under the laws of this State, for the purpose of condemning a right of way over appellant's real estate, had filed in the Cass Circuit Court an instrument of appropriation, and applied for the appointment of appraisers. It was alleged

the refusal of the council to permit the company to lay its tracks for the whole distance in the street is not such a necessity as would authorize it to exercise the power of eminent domain. *Dewey v. Chicago & M. El. Ry. Co.*, 184 Ill. 426, 56 N. E. 804. The necessity meant by the act is not an absolute physical necessity, but means the necessity arising from an expedient and reasonably convenient public use. *Aurora & G. R. Co. v. Harvey*, 178 Ill. 477, 53 N. E. 331. Under a statute (N. Y. Laws 1875, chap. 606) giving to companies formed thereunder the right to acquire the real estate necessary to enable them to operate their railways, such a company, which has two routes crossing each other at right angles, whereby the danger from collision is great, may acquire property at a street corner for the purpose of providing the curve necessary to allow the cars on one route to turn into the street occupied by the other, and thereby avoid such danger. *In re Union El. R. Co.*, 51 Hun (N. Y.), 644, 4 N. Y. Supp. 85.

3. Effect of location of line.—Where a city ordinance declares that the defendant's right of way shall be immediately adjacent to and parallel with the line of a certain alley, and the defendant thereupon locates its line west of such alley, it has no authority to condemn land for a right of way at a place to the east of such alley. *Tudor v. Chicago, etc., R. T. Co.*, 154 Ill. 129, 39 N. E. 136.

4. Exercise of power by *de facto* corporation.—Where the power to exercise the right of eminent domain is conferred by a statute upon a corporation the corporation must be a body corporate, *de jure*; it cannot maintain the proceeding if it is simply a *de facto* corporation. The constitutional protection of the rights of private property requires that the powers granted be strictly pursued and all the prescribed conditions performed. *New York Cable Co. v. Mayor, etc.*, 104 N. Y. 1, 10 N. E. 332, in which the court said: "In order to sustain proceedings by which a body claims to be a corporation, and as such empowered to exercise the right of eminent domain, and under

in the first paragraph of complaint that, unless appellees were restrained, appraisers would be appointed, and an award made and filed, the amount of the award paid into the clerk's office, and possession of the ground taken, and the company's road built thereon; that on account of certain alleged defects in the articles of association which were filed in the office of secretary of state on June 27, 1899, said traction company was not a *de jure* corporation, and, therefore, has no right to exercise the power of eminent domain. The second paragraph proceeds upon the theory that said traction company appellee was neither a *de jure* nor a *de facto* corporation, and had no existence. Prayer for an injunction. Each paragraph proceeds upon the theory that ap-

that right to take the property of a citizen, it is not sufficient that it be a corporation *de facto*. It must be a corporation *de jure*."

A corporation which is organized for the purpose of building a railroad between certain points in pursuance of a statute providing for the incorporation of companies for the purpose of constructing and operating any railroad in this State (Illinois Act of March 1, 1872), has a right to condemn land for the purpose of constructing an elevated railroad. *Lieberman v. Chicago, etc., R. T. Co.*, 141 Ill. 140, 30 N. E. 544. And a corporation organized under a general incorporation act for the purpose of constructing and operating horse railways may condemn land for that purpose, and permission from the city to locate such a road is not a prerequisite to condemnation proceedings. *Metropolitan City Ry. Co. v. Chicago West Div. Ry. Co.*, 87 Ill. 317. See also *In re Rochester Elec. Ry. Co.*, 57 Hun (N. Y.), 56, 10 N. Y. Supp. 379.

5. Determination of right to acquire by condemnation.—The statutes under which proceedings are brought for the condemnation of private property usually provide for the determination of the question as to whether or not the applicant has a lawful right to take the lands which it is sought to condemn. *Chesapeake & O. R. Co. v. Pack*, 6 W. Va. 397; *Hubbard v. Great Falls Mfg. Co.*, 80 Me. 39, 12 Atl. 878; *Emerson v. Eldorado Ditch Co.*, 18 Mont. 247, 44 Pac. 969; *Horton v. City of Grand Haven*, 24 Mich. 465. But the right to be heard upon the question as to whether private property shall be taken for a certain specified public use is a constitutional right; but it is a matter of statutory control as to whether there shall be a hearing upon this question before the land is taken. *Chandler v. Railroad Commissioners*, 141 Mass. 208, 5 N. E. 509; *People v. Smith*, 21 N. Y. 595.

Under the procedure prescribed by statute in most jurisdictions the burden is on the plaintiff to show that the land sought to be condemned is reasonably necessary. *Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528, 28 Pac. 681; *In re N. Y. Cent. R. Co.*, 66 N. Y. 407; *In re Metropolitan El. Ry. Co.*, 12 N. Y. Supp. 506; *Robinson v. Pennsylvania R. Co.*, 161 Pa. St. 561,

pellee traction company had no right to exercise the power of eminent domain. If appellee company had no such power under the statute it could not successfully prosecute said condemnation proceedings. The right of said traction company to exercise the power of eminent domain was, therefore, a question to be determined in the condemnation proceeding. *Liberty, etc., Assn. v. Brumback*, 68 Ind. 93, 95-97; *Swinney v. Ft. Wayne, etc., R. Co.*, 59 Ind. 205; 2 Lewis Em. Dom., §§ 388, 391; Mills Em. Dom. (2d ed.), § 61. See also *Great Western, etc., Co. v. Hawkins*, 30 Ind. App. 557, 66 N. E. 765. As appellant had a complete and adequate remedy at law, injunction will not lie. *Taylor v. City of Crawfordsville*, 155 Ind. 403, 406,

29 Atl. 268. And the burden is also upon the plaintiff to allege and prove that the use is a public one. *City of St. Louis v. Frank*, 9 Mo. App. 579, affirmed, 78 Mo. 41.

The corporate existence of a railroad company seeking to exercise the right of eminent domain may be shown by the company's charter, and by the fact that it is exercising the franchises thereby granted. *Peoria, etc., Ry. Co. v. Peoria & F. Ry. Co.*, 105 Ill. 110. The articles of incorporation of the appropriating company are admissible in evidence, although they go further than allowable. *Toledo Consol. St. Ry. Co. v. Toledo Elec. St. Ry. Co.*, 6 Ohio Cir. Ct. 362.

6. Injunction to prevent condemnation.—An injunction will not lie restraining the prosecution of condemnation proceedings upon the part of a city for the opening of a street upon the ground that such street will prevent a street railway company from using certain land to store its cars on, since the damages sustained by the company are recoverable at law. *Chicago, etc., Ry. Co. v. City of Chicago*, 151 Ill. 348, 37 N. E. 842.

It has been held that where land is condemned ostensibly for a lawful purpose, but really for an unlawful one, an injunction will issue to prevent such appropriation and use. *Forbes v. Delashmutt*, 68 Iowa, 164, 26 N. W. 56. But if a property-owner is able to recover and collect all the damage which he will suffer from the unlawful exercise of the power of eminent domain, he will not be permitted to restrain the exercise of such power by an injunction, but will be compelled to resort to the proceedings provided by statute for condemnation after the determination of the right to exercise such power. *Stewart v. Chicago, etc., St. Ry. Co.*, 58 Ill. App. 446. An injunction will not issue based upon the ground that the charter of a railroad company conferring the right of eminent domain is unconstitutional (*Deering v. York & C. R. Co.*, 31 Me. 172), since the statute authorizing such proceedings provides that the question may be determined therein. *Kip v. N. Y. & H. R. Co.*, 6 Hun (N. Y.), 24.

58 N. E. 490, and cases cited. The fact that a court in a condemnation proceeding may make an erroneous ruling does not entitle the aggrieved party to an injunction, but the remedy is by appeal from the ruling if authorized by statute; if not, by an appeal from the final judgment in the cause, when the entire proceeding may be reviewed, and the errors, if any, corrected by a reversal.

It is strenuously argued by appellant that a *de facto* corporation has no right to exercise the power of eminent domain given by statute to a corporation; that only corporations *de jure* can exercise such right. The conclusions we have reached renders it unnecessary to decide that question. See, however, 3 Elliott Railroads, § 957; 2 Lewis Em. Dom., § 391, and cases cited; Mills Em. Dom., § 61; *The Aurora, etc., R. Co. v. Miller*, 56 Ind. 88, and cases cited; *Doty v. Patterson*, 155 Ind. 60, 64, 65, 56 N. E. 668, and cases cited; *Marion Bond Co. v. Mexican, etc., Co.*, 160 Ind. 558, 65 N. E. 748; Beach Priv. Corp., § 866; Morawetz Corp., §§ 746, 747; 7 Am. & Eng. Encyc. of Law (2d ed.), 655, and notes 1 and 2. It follows that the court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

Indiana Railway Co. v. Hoffman.

(Indiana — Supreme Court.)

FRANCHISE REQUIRING TRANSFER TICKETS; TERRITORY ANNEXED TO CITY.—

The defendant street railway company accepted a franchise from a city which provided that the fare for one passenger should not exceed five cents between certain hours, and that transfer tickets should be issued free of charge to all passengers requesting the same who boarded its cars at any point upon its line within the limits of the city, and whose

As to issue of transfers by street railway companies see note to City of Montpelier *v. Barre & Montpelier T. & P. Co.*, *post*, page 911. See also the following cases reported in this volume: *People ex rel. Lehmaier v. Interurban St. Ry. Co.*, 2 St. Ry. Rep. 751, 177 N. Y. 296, 69 N. E. 596, affirming 1 St. Ry. Rep. 616, 85 App. Div. (N. Y.) 407, 83 N. Y. Supp. 622; *Rosenberg v. Brooklyn Hts. R. Co.*, 2 St. Ry. Rep. 807, 91 App. Div. (N. Y.) 580, 86 N. Y. Supp. 871. The following cases may be found in volume 1 of the Street Railway

destination might be upon any point upon any other line within such limits. There being no provision made to indicate that the parties intended to confine the agreement as to transfers to the limits of the city as they existed at the date it was executed, it was held that the extension of the boundaries of the city subsequent thereto did not affect the duty of the company under the agreement, and that it was required thereunder to issue transfers to any point within the boundaries of the city, notwithstanding the extension.

APPEAL by defendant from a judgment for plaintiff. Decided January 6, 1904.
Reported (Ind.), 89 N. E. 399.

A. L. Brick and D. D. Bales, for appellant.

Joseph G. Orr, for appellee.

Opinion by JORDAN, J.

Appellant is an incorporated railway company organized under the laws of this State, and is engaged in operating an electric railroad for the carriage of passengers within and without the city of South Bend, St. Joseph county, Ind. Appellee sued appellant to recover damages for being ejected by it from one of its cars within the limits of said city. The issues were joined between the parties, and the court, on request, made a special finding of facts within the issues, and stated its conclusions of law thereon favorable to appellee, and awarded him damages for

Reports: *Garrison v. United Rys. & Elec. Co.*, 1 St. Ry. Rep. 267 (with note), 97 Md. 347, 55 Atl. 371 (holding that a statutory requirement for the issue of transfers does not prohibit the company from limiting the use of the transfer to the time specified by the punch-marks thereon); *Perrine v. North Jersey St. Ry. Co.*, 1 St. Ry. Rep. 525, 54 Atl. 799 (holding that an action of tort will lie for the wrongful expulsion of a passenger from a car because of his failure to pay his fare after the refusal of the conductor to accept a transfer which was offered more than ten minutes after the transfer was issued, unless it appear that he aided in producing the situation which led to the expulsion by his own fault or carelessness); *Blume v. Interurban St. Ry. Co.*, 1 St. Ry. Rep. 569, 41 Misc. Rep. (N. Y.) 171, 83 N. Y. Supp. 989 (construing the provisions of sections 78 and 104 of the New York Railroad Law relating to the issue of transfers); *Memphis St. Ry. Co. v. Graves*, 1 St. Ry. Rep. 760, 75 S. W. 729 (holding that a street railway company is liable for the ejection of a passenger from a car upon the refusal of the conductor to accept a defective transfer, where it appeared that the defect in the transfer was caused by the negligence of the company's employee).

\$100. The validity of a franchise being in controversy the appeal is within the jurisdiction of this court.

In addition to the facts above stated, the following are substantially the other facts material to this question: In September, 1894, the General Power & Quick Transit Company was an incorporated company under the laws of this State, and was empowered to own, control, and operate a street railway. In said month the board of commissioners of St. Joseph county, Ind., granted to said company the right or franchise to construct and operate a street railway between the eastern limits of the city of South Bend, as said limits then existed, and the western limits or boundary of the town of Mishawaka, along a public highway south of the St. Joseph river, which highway ran between said city and town. Various conditions and provisions were embraced in said franchise, among which was one that the fare to be paid by each passenger for being carried over said company's railroad was not to exceed five cents for a continuous passage from one point to another along said railway. The company accepted said franchise so granted by the board, and constructed its road and operated it as provided in the franchises until the 14th day of March, 1899, at which date appellant company herein succeeded to all of its rights, franchises, property, obligations, burdens, etc., and became the owner of said railway between the aforesaid mentioned points or limits. On May 3, 1894, the common council of the city of South Bend granted the right of franchise to said General Power & Quick Transit Company, appellant's predecessor, to operate a street railway within the said city, and provided as a part of the said grant that the rate of fare for each passenger for one continuous passage upon any line or route of the railroad which might be constructed and operated within said city by said company should not exceed five cents within the city limits, and further provided that transfer tickets should be issued by the company to passengers thereon free of all charge. The ordinance granting the aforesaid right or franchise, together with all of its conditions and provisions, was, by appellant's predecessor, accepted, and has never been changed or altered in respect to the fare as therein provided. On January 19, 1885, the common council of the city of South Bend, by an

ordinance, granted a franchise to the South Bend Railway Company to operate a street railway within the city limits, and it was provided therein that the fare for one passenger should not exceed five cents, and that transfer tickets should be given "free of charge." Appellant also became the successor of this latter company. On June 22, 1885, said common council granted to the South Bend & Mishawaka Railway Company the right to build and construct a street railway over the following route: "Commencing at the city limits upon Vistula avenue in said city; thence to its intersection with Washington street; thence west on Washington street to Michigan street." This ordinance provided that the fare for each passenger over any route or part of said railroad should not exceed five cents between the hours of 6 o'clock, A. M., and 11 o'clock, P. M., after which time the company might exact ten cents. This ordinance was silent in regard to transfer tickets. Said company, after acquiring said franchise, constructed a street railway over and along said route as provided by the grant. Appellant also became the successor of this company. On the 11th day of September, 1899, an action was pending in the Circuit Court of Laporte county against appellant, which at that time was the successor and assignee of all of the aforesaid railway companies, and the owner and in control of and operating a continuous line of railroad from the center of the city of South Bend along the street known as Vistula avenue therein, and over and upon the Vistula road to the town of Mishawaka, and, in order to effect an amicable settlement, compromise, and adjustment of all differences existing between the said city and the appellant and its constituent companies involved in said action, appellant submitted a proposition in writing to the common council of the city of South Bend, which proposition was duly accepted by the council, and became a part of its records. Under this proposition, for the purposes aforesaid stated, appellant proposed to pay into the treasury of the city, within ninety days of the acceptance thereof, \$12,000 and over, this sum being the amount of the claim against the South Bend Railway Company, and, in addition thereto, to pay all costs, etc., in the case. By this written proposition appellant also proposed forthwith, upon the acceptance thereof by the city of South

Bend, to issue transfer tickets free of charge to all passengers requesting the same who boarded its cars at any point upon its line within the limits of the city of South Bend, and whose destination might be upon any point upon any other line of appellant within the said city limits; such transfer tickets to be valid only upon the next car leaving upon the line indicated thereon after the issuing of the same. The city of South Bend, after accepting this proposition, dismissed of record the suit pending against the South Bend Railway Company in the Laporte Circuit Court. On October 14, 1901, the city of South Bend, by annexing territory to the said city, extended the limits thereof eastwardly along said Vistula road to a distance of about half a mile, and by the terms of said ordinance established the east line of the city limits upon said Vistula highway, thereby taking into the city of South Bend about half a mile of the said Vistula public road, which had theretofore been outside of the city, and upon which part of said road said line of railway had been previously operated under the franchise granted by the board of commissioners as hereinbefore stated. On the 14th day of January, 1902, some time before 6 o'clock, P. M., the appellee boarded one of appellant's regular east-bound passenger cars at a point on Washington street in said city of South Bend for the purpose of going to his home in Roseland park, which park is situated in the territory which was annexed to the city by the annexation proceedings in October, 1901. He paid to the conductor of the car five cents in payment of his fare. This was the usual legal fare, and he requested and received a transfer ticket for the east-bound car on Vistula avenue in said city. When the car arrived at the point where a change should be made, he immediately transferred to the Vistula avenue car running on appellant's Vistula avenue line, and upon which car it was the custom of appellant to receive and carry passengers on transfers whose destination was on any point along its route within the limits of the city of South Bend, as said limits existed prior to the annexation aforesaid. He gave to the conductor in charge of the Vistula avenue car his transfer ticket, and the conductor permitted him to ride on said transfer ticket until the car had gone beyond the old limits to a point on the said Vistula road. At this point the company, by its said conductor,

demand of him that he pay an extra fare. This he refused to do, and thereupon appellant, by its officers, agents, etc., ejected him from the car. The point at which he was expelled from the car was within the limits of the city of South Bend as they were fixed under the annexation proceedings in October, 1901, but was outside the limits of the city as they existed at the time said railway was built, and as they had existed up to October 14, 1901. The point where he was ejected was upon that part of said railway line which had been built and constructed under the franchise granted by the board of commissioners as hereinbefore stated.

It is contended by counsel for appellee that the franchise granted by the county commissioners to construct and operate the railroad to appellant's predecessor upon the public highway between the cities of South Bend and Mishawaka cannot in any manner be abridged or impaired without appellant's consent, either by direct or indirect proceedings on the part of the city of South Bend or any other person or corporation. This franchise, it is said, was a contract between the county and the company to which it was granted. It is insisted that the franchise granted by the board of commissioners to the General Power & Quick Transit Company, one of appellant's predecessors, to construct and operate its road along that part of the public highway in question which at that time was outside of the city limits of South Bend, and the agreement between appellant and the city under the franchise of May 3, 1894, in relation to the fare to be charged for the transportation of passengers, should be so construed as to leave both in full force and effect. While it is true that appellant, as the successor of the several other companies, as shown by the special finding, succeeded to all their rights under the grants of the several franchises in controversy, and likewise is bound by all of the conditions and stipulations composed therein, however these rights and obligations, under the facts, do not necessarily control the decision of the question as here presented. These, as to the question of transfer tickets, may be passed, as in our opinion this matter is regulated by the contract entered into between the city and appellant on September 11, 1899. It appears that on that date, after appellant had become the successor and as-

signee of all of the rights of the several companies, and was the owner of and in control of a line of railway running from the center of the city of South Bend along Vistula avenue therein on to the limits of the city, and thence along and upon the Vistula highway to the town of Mishawaka, in a settlement, adjustment, and compromise of all differences existing between appellant and the city in an action pending in the Laporte Circuit Court, it made to the city a written proposition, as shown, whereby, among other things, it stipulated and agreed forthwith upon the acceptance of its proposition by the city to "issue transfer tickets free of charge to all passengers requesting the same" who might board the cars at any point upon any of its lines within the limits of the city, whose destination might be to any point upon any other line of the company's road within said limits. This proposition, as shown, was duly accepted by the city, and placed upon its records, and became a binding contract between it and appellant. There was no provision made therein to indicate that the parties were intending to confine the agreement to the limits of the city as they existed on the said 11th day of September, 1899, and under the circumstances it cannot, in reason, be asserted that the parties only intended to include the limits as they then were, and not as they might thereafter be extended. The right of the city of South Bend to enlarge her boundaries under the laws of this State is governmental, which it cannot bargain away, and it may be presumed that appellant under its contract, whereby it agreed to issue the transfer tickets within the city limits, must have contemplated that the city in the future might exercise the right of annexing territory, and thereby extend its limits. Upon no view of the case can the provision "within the limits of the city" be interpreted to have been intended under the agreement embraced in the proposition made by appellant to apply only to such limits as then fixed.

It is apparently insisted by counsel for appellant that the city of South Bend, by annexing the part of the territory in which appellant, under the grant from the board of commissioners, had previously operated its road, abrogated and destroyed its rights acquired by said grant, and, therefore, violated our fundamental laws. But whatever rights appellant had in said territory under

its grant from the board of commissioners were not impaired or destroyed by the extension of the city boundary in question, but were changed by its agreement with the city to issue transfer tickets over its lines therein to all points within the city limits. Whatever rights it had to decline or refuse to issue transfers to persons carried over its road in said territory were merged in and controlled by the contract which it subsequently made with the city. If appellant desired to stand upon and avail itself of the rights which it had acquired in the territory in question, it ought not to have entered into the agreement and contract with the city in regard to the rate of fare and the right of passengers to transfer. The regulation of the question of fare and the transfer tickets to be issued rests upon the contract in this case between appellant and the city of South Bend. It bound itself thereby not to exact of passengers transported over its lines within the city more than the maximum fare, and to issue, upon request, to such passengers, transfer tickets, as provided. This agreement, as we have seen, cannot be held to apply only to passengers who are transported on appellant's cars within the old limits of the city, but must be held to apply to and include any and all passengers whose destination is within the limits of the city as they were extended by the annexation of the territory in controversy. This extension, as we have said, by the municipal authorities, was the exercise of governmental powers. In a legal sense the city is a unit, although its boundaries may be changed from time to time by extension, and all person within the limits thereof, as extended, become bound by, and must yield obedience to, its ordinances. It certainly, in reason, cannot be asserted that an ordinance adopted by a city must, in its operation, forever be confined to the limits of the municipality as they were at the time it was passed, and cannot become operative in territory thereafter annexed and made a part of the corporation. And with no more force and reason can it be said in this case, under the circumstances, that the agreement of appellant in regard to issuing transfer tickets to passengers is not operative within the limits of the city as thereafter extended. In support of this proposition, see *McCallie v. The Mayor et al.*, 3 Head, 317; *St. Louis, etc., Co. v. St. Louis*, 46 Mo. 121; *Town of Toledo v. Edens*, 59 Iowa,

352, 13 N. W. 313; *Town of Milwaukee v. Milwaukee*, 12 Wis. 93; 20 Am. & Eng. Encyc. of Law, p. 1152.

Conceding, *arguendo*, that the question as to whether appellant and the city of South Bend, under the agreement in controversy, contracted solely in respect to the limits of the city as they existed at the time of the contract, and not in reference to such limits as they might thereafter be extended, is a doubtful one, nevertheless we would be required to solve such question against appellant and in favor of the city, because public contracts, as is the one herein involved, should be liberally construed in favor of the public. See *Muncie, etc., Gas Co. v. City of Muncie* (Ind. Sup.), 66 N. E. 436, 60 L. R. A. 822, and the great line of authorities cited on page 442, 66 N. E., 60 L. R. A. 822.

Under the facts, the expulsion of appellee from the car by the servants of appellant was wrongful. Therefore the court did not err in its conclusions of law.

Judgment affirmed.

Indianapolis & Greenfield Rapid Transit Co. v. Foreman.

(Indiana — Supreme Court.)

1. INJURY TO SERVANT; WORKMAN ON TRACK FELLOW SERVANT OF MOTOR-MAN.¹—The plaintiff, a laborer engaged in the construction of street railway tracks, while seated in a work car of the defendant preparatory to being carried to his home, was injured by one of the defendant's passenger cars colliding with such work car. It was held that such laborer was a fellow servant of the motorman and other employees having charge of the passenger car which collided with the work car in which he was seated.

1. Fellow-servant rule as applied to street railway employees.—See note to *Chicago City Ry. Co. v. Leach*, *ante*, p. 156. The cases reported in this series pertaining to the relationship of fellow servants between employees of street railway companies are cited in such note.

Under the Indiana Employers' Liability Act of 1893, it has been held in a railroad case that an employee injured by the negligence of another, while both were acting in the line of duty as employees of a corporation, has a right of action against the company. *Pittsburgh, etc., R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582.

2. **PLEADING UNDER EMPLOYER'S LIABILITY ACT.**—It is provided by statute (Burns' Rev. Stats. 1901, § 7083), "that every railroad * * * shall be liable for damages for personal injuries suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence. * * * 2. Where such injury resulted from the negligence of any person in the service of such corporation to whose order or direction the injured employee at the time of the injury was bound to conform and did conform." It is held that a complaint under the second subdivision must contain an allegation that the injured employee was conforming to the order or direction of some person in the service of the corporation to whose order or direction he was bound to conform and did conform, and an allegation to the effect that the plaintiff was bound to conform to the order and direction, and that while on said car the defendant negligently and carelessly ran one of its other cars into and caused the same to collide with the car which the plaintiff had entered, was insufficient.
3. **LIABILITY UNDER STATUTE FOR NEGLIGENCE OF SWITCHMEN.**—No liability is created by subdivision 4 of the above section for injuries caused by the negligence of persons in charge of a switch.
4. **ALLEGATION AS TO RECKLESS AND INCOMPETENT MOTORMAN.**²—An allegation in a complaint stating that the injury complained of was caused by the negligence of a motorman in the service of the defendant who was a reckless and incompetent motorman and was known to be such by the appellant long before the collision in which the plaintiff was

Injury to employee while being transported.—See note to *Noe v. Rapid Ry. Co.*, 1 St. Ry. Rep. 340. In that case the plaintiff, an employee of a street railway company, while being transported upon one of the cars of the company, was injured by the car running into a switch which had been opened by the act of a third person. The negligence charged was the failure to have a light or target at the switch, the failure to keep the switch locked, and the failure of the motorman to lessen the speed of the car at this point. It was contended that the negligence causing the injury was that of the motorman, and that the motorman was a fellow servant of the plaintiff, and that, therefore, there could be no recovery. It was held, however, that the evidence did not show that the injury was caused by the negligence of the motorman, but that the fault was in not providing a safe system in running the cars. See *Bowles v. Indiana Ry. Co.*, 27 Ind. App. 672, 62 N. E. 94, 87 Am. St. Rep. 279; monographic note to *Illinois Cent. R. Co. v. Keefe*, 61 Am. St. Rep. 97.

2. **Allegations as to incompetency of fellow servant.**—In an action by a servant against his master for injuries resulting from the negligence of a fellow servant, it is held in Indiana that the complaint is demurrable if it fails to negative knowledge by the plaintiff of the fellow servant's negligent habits, though it alleges that the master had knowledge of such habits. *Lake Shore, etc., Ry. Co. v. Stupak*, 108 Ind. 1, 8 N. E. 630; *Louisville, etc., Ry. Co. v. Breedlove*,

injured, does not sufficiently meet the requirement that in such cases the complaint must allege that the plaintiff had no knowledge of the recklessness and incompetency of the motorman. And an allegation of the want of knowledge of such recklessness and incompetency on the part of the injured employee must be as broad as the allegation of knowledge on the part of the employer.

5. **ALLEGATION AS TO DEFECTIVE CONSTRUCTION OF WORK CAR.**—It appearing that the proximate cause of the plaintiff's injuries was the running of another car into and upon said work car, and not the negligent construction and equipment of said work car, the allegations in the complaint as to the age and negligent construction and equipment of the work car, and the danger of operating it on the main line may be disregarded.
6. **EMPLOYEE'S KNOWLEDGE OF DEFECTS MUST BE ALLEGED.**—A complaint, in an action by an employee against his employer for injuries received while in his employment, must allege that the employer had no knowledge of the defects or imperfections causing the injuries complained of.

APPEAL by defendant from judgment for plaintiff. Decided January 29, 1904.
Reported (Ind.), 69 N. E. 669.

W. A. Brown and Binford & Walker, for appellant.

Marsh & Cook, Forkner & Forkner, and E. T. Glasscock, for appellee.

Opinion by **MONKS, J.**

Appellee brought this action against appellant and the Kirkpatrick Construction Company, a corporation, to recover for a personal injury alleged to have been caused by the negligence

10 Ind. App. 657, 38 N. E. 357; *Spencer v. Ohio, etc., Ry. Co.*, 130 Ind. 181, 29 N. E. 915. But in cases arising in other jurisdictions it has been held that it is not presumed that a servant knew of the incompetency of his fellow servant and he need not negative such knowledge in his complaint. *Galveston Rope & Twine Co. v. Burkett*, 2 Tex. Civ. App. 308, 21 S. W. 958; *Cole v. Chicago, etc., Ry. Co.*, 67 Wis. 272, 30 N. W. 600.

In the case of *Dunmead v. American Mining & Silver Co.*, 12 Fed. 847, 4 McCrary, 244, it was held that in an action by a servant against his master for injuries caused by the negligence of an incompetent fellow servant, the plaintiff must allege that he did not know, and had no means of knowing, of the character of such fellow servant, or of his capacity and fitness.

Allegations as to want of knowledge of defects.—There seems to be much conflict of authority in respect to the doctrine that in an action by an employee against his employer for injuries received from defects in tools,

of said corporations. The defendants jointly filed a demurrer to each paragraph of the amended complaint, and each defendant filed a separate demurrer to each paragraph of the complaint. These demurrers, which challenged each paragraph of the complaint for want of facts, were overruled by the court, to which ruling the defendants "jointly and separately excepted." A trial of said cause resulted in a general verdict against appellee as to the Kirkpatrick Company and in favor of appellee against appellant. Appellant filed a motion for a new trial, which was overruled, and judgment was rendered on the verdict in favor of appellee. The errors assigned call in question the action of the court in overruling (1) the joint demurrer of appellant and said construction company to the amended complaint, (2) the separate demurrer of appellant to each paragraph of the amended complaint, and (3) appellant's motion for a new trial. The amended complaint is also challenged by an assignment that the same "does not state facts sufficient to constitute a cause of action."

Appellee insists that appellant's assignment of error predicated upon the exception taken by appellant to the rulings on the de-

machinery, and places of employment, the employee must allege that he had no knowledge of such defects, or that if he had such knowledge he must allege facts which show a sufficient reason for continuing in the employment. The Indiana cases cited in the principal case seem to indicate that this doctrine is established in that State. Other cases declaring the same doctrine in other jurisdictions are as follows: *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Bogenschutz v. Smith* (Ky.), 3 S. W. 800; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113, 77 Am. Dec. 212; *Chicago, etc., Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857; *Mad River, etc., R. Co. v. Barbar*, 5 Ohio St. 541, 67 Am. Dec. 312; *Norfolk & W. R. Co. v. Jackson*, 85 Va. 489, 8 S. E. 370. The weight of authority, however, seems to be in favor of the proposition that in such an action the plaintiff need not allege that he did not know of the existence of the defect. *Mobile, etc., R. Co. v. George*, 94 Ala. 199, 10 So. 145; *McGee v. Northern Pac. C. R. Co.*, 78 Cal. 430, 21 Pac. 114, 12 Am. St. Rep. 69; *Chicago, etc., R. Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515; *Young v. Shickle, etc., Iron Co.*, 103 Mo. 324, 15 S. W. 771; *Hall v. St. Joseph Water Co.*, 48 Mo. App. 356; *Johnston v. Oregon S. L., etc., R. Co.*, 23 Oreg. 94, 31 Pac. 283; *Donahue v. Enterprise R. Co.*, 32 S. C. 299, 11 S. E. 95, 17 Am. St. Rep. 854; *Hoffman v. Dickenson*, 31 W. Va. 142, 6 S. E. 53; *Berns v. Gaston Gas, Coal Co.*, 27 W. Va. 285, 55 Am. Rep. 304; *Cole v. Chicago & N. W. Ry. Co.*, 67 Wis. 272, 30 N. W. 600.

murrers to each paragraph of the complaint presents no question as to the sufficiency of the paragraphs thereof. Citing *City of South Bend v. Turner*, 156 Ind. 418, 421, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200. It will be observed that in the case cited the exception was joint, while in this case the defendants "jointly and separately excepted." It is clear, therefore, that the case cited is not in point here. The first paragraph of the amended complaint proceeds upon a common-law liability.

Appellant was, on May 27, 1901,

"a corporation owning and operating an interurban street railway extending from Irvington to Greenfield, in this State, and was a common carrier of passengers for hire. On said day appellee was an employee of appellant as a common laborer, and was engaged with divers others in constructing a spur from appellant's track to Spring Lake, a distance of three-fourths of a mile. Appellant had in use on said day a car known as a 'work car,' which had been and was used in carrying its employees to divers points along said road where they were engaged and employed by appellant in building, maintaining, and repairing its said line of road. After said day's work had been finished, at about 6:30 P. M., appellee, with divers other employees of appellant, entered said work car on said spur for the purpose of being carried to Greenfield, where he resided. While he was in said car, and the same was standing on a switch of appellant's road, one of appellant's passenger cars in charge of its employees approached said switch from the west at a high and dangerous rate of speed, to wit, thirty miles per hour, and ran into and upon said switch and collided with said work car and injured appellee."

In addition to the averments in the first paragraph of the amended complaint showing the above facts, there are other allegations showing that the collision and consequent injury of appellee were caused by the negligence and carelessness of appellant's employees in charge of said passenger car in not obeying the rules of appellant.

It is also alleged in said first paragraph that

"The work in which appellee was engaged was common labor upon the tracks of appellant, and had no connection with, nor was the same in any manner incident to or a part of the work or employment of, said motorman or servants in charge of the passenger car; nor were the squad of laborers with whom said appellee was working as aforesaid, and who were with him in said work car, in any manner connected or associated with the said servants of appellant in charge of said work car or said passenger car which collided with it; that appellee had no charge of said work car or the operation thereof, but was simply a passenger thereon at the time of the accident."

Appellee says that this "paragraph of the complaint proceeds upon a common-law liability," and that the same is sufficient, because it is alleged that his injury was occasioned by the negligence of other servants of the company, whose duties were not common nor in the same department with those of the appellee. Citing *Fitzpatrick v. New Albany, etc., R. Co.*, 7 Ind. 436. It was held in the case cited and in *Gillenwater v. Madison, etc., R. Co.*, 5 Ind. 339, 61 Am. Dec. 101, that a railroad company is liable to an employee for an injury occasioned by the negligence of other employees of the company where the duties of the latter, in connection with which the injury happens, are not common or in the same department with those of the injured servant. Those cases, however, were overruled on this point in *Columbus, etc., R. Co. v. Arnold*, 31 Ind. 174, 183, 99 Am. Dec. 615, where it was said concerning said rule:

"But this limitation of the exemption of the company from liability in such cases is not recognized in any of the subsequent cases, and it is now settled in this State that the employer is not liable for an injury to one employee occasioned by the negligence of another engaged in the same general undertaking. *The O. & M. R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Wilson v. The Madison, etc., R. Co.*, 18 Ind. 226; *Slattery's Admr. v. The Toledo & W. R. Co.*, 23 Ind. 81; *The O. & M. R. Co. v. Hammersley*, 28 Ind. 371. In *Slattery's Admr. v. The Toledo & W. R. Co.*, *supra*, Worden, J., quotes with approbation from the decision in *Wright v. The N. Y. Central R. Co.*, 25 N. Y. 562, as follows: 'Neither is it necessary, in order to bring a case within the general rule of exemption that the servants, the one that suffers and the one that caused the injury, should be at the time engaged in the same operation or particular work. It is enough that they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties and services tending to accomplish the same general purposes, as in maintaining and operating a railroad, operating a factory, working a mine, or erecting a building. The question is whether they are under the same general control.' To the same effect is the case of *Manville v. The Cleveland, etc., R. Co.*, 11 Ohio St. 417, where it is said that 'those employed in facilitating the running of the trains by ballasting the track, removing obstructions, and those employed at stations attending to switches and other duties of a like nature upon the road, as well as those upon the trains operating, may all be well regarded as fellow servants in the common service.'"

In *Gormley v. Ohio, etc., R. Co.*, 72 Ind. 31, a laborer, whose duty was to assist in repairing the track, etc., while being carried

to his work on a hand-car, was killed by a collision with a freight train. His death was occasioned by the negligence of the engineer in charge of the engine and said train. The court's attention was called to the cases of *Gillenwater v. Madison, etc., R. Co., supra*, and *Fitzpatrick v. New Albany, etc., R. Co., supra*, and on page 33 it was said:

"The cases cited by counsel were not overlooked, but were referred to and explained or disapproved in the later cases. *Slaterry's Admr. v. The T. & W. R. Co.*, 23 Ind. 81; *The Columbus, etc., R. Co. v. Arnold*, 31 Ind. 174; *Wilson v. The Madison, etc., R. Co.*, 18 Ind. 226; *The Pittsburgh, etc., R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111; *Sullivan v. The T. W. & W. R. Co.*, 58 Ind. 26. These later cases are certainly not consistent with the ground on which it is sought to have a right of recovery in the appellant. If a hardship results from the application of the rule that an employer is not liable to one employee for an injury caused by another employee engaged in the same general undertaking, it is more fitting that the Legislature be invoked to give a remedy than that this court should undertake to introduce doubtful exceptions to a rule so clearly established."

In *Evansville, etc., R. Co. v. Barnes*, 137 Ind. 306, 310, 36 N. E. 1092, the rule as stated in *Cleveland, etc., R. Co. v. Arnold, supra*, is quoted with approval. The following cases are to the same effect: *Thacker v. Chicago, etc., R. Co.*, 159 Ind. 82, 85, 64 N. E. 605, 59 L. R. A. 792, and cases cited; *Thompson v. Citizens' Street R. Co.*, 152 Ind. 461, 469, 53 N. E. 462, and cases cited; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303; *Spencer v. Ohio, etc., R. Co.*, 130 Ind. 181, 184, 29 N. E. 915, and cases cited; *Clark v. Pennsylvania Co.*, 132 Ind. 199, 31 N. E. 808, 17 L. R. A. 811, and cases cited; *Capper v. Louisville, etc., R. Co.*, 103 Ind. 305, 2 N. E. 749; *Indiana Ry. Co. v. Dailey*, 110 Ind. 75, 79, 80, 10 N. E. 631, and cases cited; *Sullivan v. Toledo, etc., R. Co.*, 58 Ind. 26, 27, 28; 1 Woolen's Trial Proc., §§ 350, 351; Beach Cont. Neg., § 331. It is clear, under the cases cited, that appellee, an employee of appellant, engaged in common labor upon its track, was a fellow servant with those in charge of the passenger car.

It is a general rule in this State that employees, while being transported to and from their work on the cars of trains of their employers, as fellow servants of those engaged in the same general undertaking, and, if injured while being so carried by the

negligence of a fellow servant, the employer is not liable therefor. *Bailey Mast. & Serv.*, 283, 360, 361, and cases cited; *Ohio, etc., R. Co. v. Hammersley*, 28 Ind. 371; *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226, 230, and cases cited; *Capper v. Louisville, etc., R. Co.*, 103 Ind. 305, 308, 309, 2 N. E. 749, and cases cited; *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 366, 369, 74 Am. Dec. 259, and cases cited; *Gormley v. Ohio, etc., R. Co.*, 72 Ind. 31; *Bowles v. Indiana Ry. Co.*, 27 Ind. App. 672, 675, 62 N. E. 94, 87 Am. Rep. 279, and cases cited; *Ewald v. Railway Co.*, 70 Wis. 420, 36 N. W. 12, 591, 5 Am. St. Rep. 178; *Gilman v. Eastern R. Co.*, 10 Allen, 233, 87 Am. Dec. 635; *Gillshannon v. Stony, etc., R. Co.*, 10 Cush. 228; *Ryan v. Cumberland, etc., R. Co.*, 23 Pa. St. 384; *Vick v. New York, etc., R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36. The allegation that the work appellee was engaged in doing had no connection with, nor was in any way connected with or incident to, or a part of, the work or employment of the motorman or servants in charge of the passenger car, and the allegation that he was simply a passenger on the work car, and the allegation that appellant owed him a duty, and was bound to carry him safely, are mere conclusions of the pleader, and are not admitted by the demurrer, and cannot control the special facts alleged, which show that he was a fellow servant of those in charge of the passenger car. *Woollen's Trial Proc.*, § 1037. It is true that if an employee is injured by the negligence of a fellow servant who is incompetent, and this incompetency is the proximate cause of the injury, the employer is liable therefor if he knew, or could by the exercise of ordinary care have known, of such incompetency, and the injured employee was not guilty of any negligence contributing to his injury, and did not know and could not have known of such incompetency by the exercise of ordinary care. For if an injured employee has knowledge of the incompetency of his fellow servant by whose negligence he is injured, and enters the service with such knowledge, or continues therein after he obtains or could by the exercise of ordinary care have obtained such knowledge, he assumes the risks incident to such incompetency. *Lake Shore, etc., R. Co. v. Stupak*, 108 Ind. 1, 5, 6, 8 N. E. 630, and cases cited; *Louisville, etc., R. Co. v. Sandford*, 117

Ind. 265, 266-269, 19 N. E. 770, and cases cited; *Indianapolis, etc., R. Co. v. Watson*, 114 Ind. 20, 25, 27, 14 N. E. 721, 15 N. E. 824, 5 Am. St. Rep. 578, and cases cited; *Indiana, etc., R. Co. v. Dailey*, 110 Ind. 75, 81, 82, 10 N. E. 631; *Louisville, etc., R. Co. v. Kemper*, 147 Ind. 561, 565-567, 47 N. E. 214, and cases cited; *Kroy v. Chicago, etc., R. Co.*, 32 Iowa, 357; 1 Woollen's Trial Proc., §§ 1347, 1348, 1352. No such facts were alleged in said paragraph. It follows that the court erred in overruling the demurrer to the first paragraph of the amended complaint.

The second paragraph of the amended complaint alleges that appellee's injury was caused by the negligence of the employee in charge of the switch in opening the same so as to allow the passenger car to enter thereon and collide with the work car. Conceding, without deciding, that this paragraph sufficiently charges the incompetency of the person in charge of said switch and appellant's knowledge thereof, it is not alleged that appellee did not know of such incompetency before the injury. For want of allegations negating such knowledge on the part of appellee the paragraph was clearly insufficient. It is alleged in said paragraph that appellee was injured "without any fault or negligence on his part," but this does not take the place of averments showing that the risk of the incompetency of the person in charge of the switch was not knowingly assumed as an incident of his service. *Louisville, etc., R. Co. v. Corps*, 124 Ind. 427, 428, 24 N. E. 1046, 8 L. R. A. 636; *Peerless Stone Co. v. Wray*, 143 Ind. 574-576, 42 N. E. 927; *Cleveland, etc., R. Co. v. Parker*, 154 Ind. 153, 56 N. E. 86, and cases cited; *Bowles v. Indiana R. Co.*, 27 Ind. App. 672, 676, 62 N. E. 94, 87 Am. St. Rep. 279, and cases cited; Woollen's Trial Proc., § 1347.

The third paragraph of the amended complaint is founded upon the second subdivision of section 7083, Burns' Rev. Stat. 1901 (§ 5206s, Horner's Rev. Stat. 1901), which provides.

"That every railroad * * * shall be liable for damages for personal injuries suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence. * * * Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee at the time of the injury was bound to conform and did conform."

In order to make a good complaint under this subdivision, it is necessary to allege, among other things, that the injured employee was conforming to the order or direction of some person in the service of the corporation, to whose order or direction he was bound to conform and did conform, and that while conforming to such order or direction he was injured by the negligence of the employee to whose order he was conforming. *Thacker v. Chicago, etc., R. Co.*, 159 Ind. 82, 90-93, 64 N. E. 605, 59 L. R. A. 792; *Louisville, etc., R. Co. v. Wagner*, 153 Ind. 420, 53 N. E. 927; *American Rolling Mill Co. v. Hullinger* (No. 20,100), 69 N. E. 460. It is alleged in said paragraph that on the 27th of May, 1901, appellee was in the service of appellant as a common laborer, and was directed by appellant to enter one of its cars about one mile west of Philadelphia for the purpose of being carried by appellant to the city of Greenfield; that appellee was bound to conform to the order and direction aforesaid, and that while on said car appellant negligently and carelessly ran one of its other cars into and caused the same to collide with the car which appellee had entered, whereby he was injured, etc. This paragraph is clearly insufficient. It is not shown that the employee by whose negligence he was injured was the one to whose order or direction he was bound to conform and was conforming when injured. Proof that appellee was injured while conforming to the order or direction of one employee, to whose order and direction he was bound to conform, and that his injury was caused by the negligence of another coemployee, who had no such authority, would sustain said allegations of the third paragraph, but would not make a case under said second subdivision of section 7083, *supra*.

In the fourth paragraph it is alleged that appellee, a laborer in the service of appellant, was directed to enter said work car for the purpose of being carried to Greenfield, and was thence carried to a siding; that at the time and place

"where said car was side-tracked the switch was placed by appellant in charge of one of its servants, who then and there negligently and carelessly operated said switch so that another car of appellant ran into the same and collided with great force and violence with the car on said switch in which appellee was then riding, whereby he was injured, etc. * * * That said

servant of appellant in charge of said switch as aforesaid was at the time and place acting in the place and performing the duties of said appellant, and that appellee was then and there obeying and conforming to the order of appellant at the time of such injury."

It is evident from what we have already said that the allegations of said paragraph are not sufficient to avoid the effect of the common-law rule that an employee cannot recover for injuries caused by the negligence of a fellow servant. It is also clear from what was said in regard to the third paragraph that a cause of action is not stated under the second subdivision of section 7083, Burns' Rev. Stat. 1901, a part of the Employers' Liability Act of 1893.

Neither does the allegation concerning the negligence of the person in charge of the switch state a cause of action under the fourth subdivision of the Employers' Liability Act, for no liability is created by said subdivision for injuries caused by the negligence of persons in charge of a switch. *Baltimore, etc., R. Co. v. Little*, 149 Ind. 167, 48 N. E. 862. It is a well-settled rule that when a party seeks the benefit of a statute he must, by averment and proof, bring himself within its provisions. *American Rolling Mill Co. v. Hullinger* (this term), 69 N. E. 460; *Hodges v. Standard Wheel Co.*, 152 Ind. 680, 693, 52 N. E. 391, 54 N. E. 383; *Porter v. State*, 141 Ind. 488, 490, 40 N. E. 1061; *Weir v. State ex rel. Wohl* (this term), 68 N. E. 1023, 1024; *Goodwin v. Smith*, 72 Ind. 113, 116, 37 Am. Rep. 144; *Van Sickle v. Belknap*, 129 Ind. 558, 559, 28 N. E. 305; *Jackson School Tp. v. Farlow*, 75 Ind. 118, 120, 121; *Potts v. Felton*, 70 Ind. 168, 169; *Blanchard v. Wilbur*, 153 Ind. 387, 392, 55 N. E. 99; *Massey v. Dunlap*, 146 Ind. 350, 354, 355, 44 N. E. 641; *Chicago, etc., R. Co. v. Vert*, 24 Ind. App. 78, 81, 56 N. E. 139; *Baltimore, etc., R. Co. v. Harmon* (Ind. Sup.), 68 N. E. 589; *Toledo, etc., R. Co. v. Long* (Ind. Sup.), 67 N. E. 259; *Chicago, etc., R. Co. v. Glover*, 159 Ind. 166, 169, 62 N. E. 11. Said third and fourth paragraphs wholly fail to bring appellee within any of the provisions of the Employers' Liability Act of 1893.

The fifth paragraph of complaint is predicated upon common-law liability, and proceeds upon the theory that the injury com-

plained of was caused by the negligence of a motorman in the service of appellant, who was a reckless and incompetent motorman, and was known to be such by appellant long before the collision in which appellee was injured. It is not alleged in said paragraph that appellee had "no knowledge of the recklessness and incompetency of the motorman." Such an allegation is essential to the sufficiency of a paragraph predicated upon the incompetency of a fellow servant. True, it is alleged that the passenger car in charge of the motorman "collided with the car in which appellee was riding, whereby appellee, without any fault or negligence on his part, and without any knowledge of the careless and reckless conduct of said motorman in operating his said car, was thrown with great force and violence forward in said car," and thereby injured. The allegation that appellee was "without any knowledge of the careless and reckless conduct of said motorman in operating said car" means only that he had no knowledge of the careless and reckless manner in which the motorman was operating his car at the time of the collision. This is not equivalent to an allegation that appellee at and before the time of his injury had no knowledge of the recklessness and incompetency of the motorman. *Lake Shore, etc., R. Co. v. Stupak*, 108 Ind. 1, 5, 8 N. E. 630. The averment of the want of knowledge on the part of the injured employee must be as broad as the allegation of knowledge on the part of the employer. *The Peerless Stone Co. v. Wray*, 143 Ind. 574-577, 42 N. E. 927. We have already shown that an allegation that appellee was without any fault or negligence on his part does not supply the place of averments showing that the risk of the incompetency of the motorman was not voluntarily assumed as an incident of his service.

It is alleged as against appellant in the sixth paragraph that appellee was in the service of appellant constructing a spur track from appellant's main line to Spring Lake, "and was and had been carried by defendant [appellant] from his home in Greenfield to and from his place of employment; that for the carrying of said plaintiff and his colaborers to and from the point aforesaid the defendant had furnished a work car propelled by electricity; that it was so old and so negligently constructed

and equipped that it could not be operated on the defendant's main line without great danger of collision with the other cars of defendant running between stations, or delaying the same in making their schedule time; that at the close of plaintiff's day's work and on said day he was ordered, directed, and invited by the defendant, by and through its authorized agents and employees, to enter into and upon said work car, to be carried from his place of employment to his said home in Greenfield aforesaid; that by reason of the said order, direction, and invitation of the defendant aforesaid, and directed and induced thereby, the plaintiff entered into and upon said car for the purpose of being carried as aforesaid to his said home aforesaid; that said car proceeded upon its course upon defendant's main track for some distance toward the said town of Greenfield, whereupon (by reason of its defective construction and equipment thereof) the defendant and its employees (were compelled to and did) run said car into and upon a side track of the defendant connecting with its main line to permit an incoming car to pass the same, and while said car was standing upon said track, and while the plaintiff was lawfully and rightfully in and upon said car for the purpose of being carried to his home aforesaid, the defendant negligently and carelessly by and through the negligence of its motorman, officers, agents, and employees in the control, management, and direction of said cars and the switchman in charge of said switch, and by reason of its negligent and defective rules and mode of keeping knowledge of and directing its cars, run another car with a speed of thirty miles per hour into and upon said switch, and into and upon the said car in which the plaintiff was situated as aforesaid, and upon, into, and against the plaintiff — all without any fault or negligence of the plaintiff in any particular whatever." It cannot be held that said paragraph shows that appellant had failed to exercise ordinary care in "establishing and promulgating its rules, or in the mode of keeping knowledge of and directing its cars." There are no direct averments to that effect. Moreover, said allegations are mere conclusions of the pleader stated by way of recital. Facts, not conclusions, must be averred; and they must be pleaded directly and positively. It avails nothing as against a demurrer to

aver conclusions or to plead facts by way of recital. *Nysewander v. Bowman*, 124 Ind. 584, 590, 24 N. E. 355; *Weir v. State ex rel.* (Ind. Sup.), 68 N. E. 1023, 1024, and cases cited; *Roberts v. Lovell*, 38 Wis. 211, 215; Bliss Code Pleading (3d ed.), § 318. In determining the sufficiency of said paragraph, therefore, we must eliminate the allegation in regard to "negligent and defective rules" and "mode of keeping knowledge of and directing their cars." If the negligent construction and equipment of the work car and the alleged great danger of operating it on the main line were the proximate cause of the injury, the same would be insufficient, because it is not alleged that appellee had no knowledge of the negligent construction and equipment of said work car, and the consequent danger of collision with other cars. In other words, to be sufficient on the ground of the negligent construction, etc., of the work car, the allegations must show that he has not assumed the risks incident to the defective construction of the work car of which he complains. It is evident, however, that the proximate cause of appellee's injuries was the running of another car "into and upon said work car," and not the negligent construction and equipment of said work car. What is alleged in regard to the age and negligent construction and equipment of the work car, and the danger of operating it on the main line, may, therefore, be disregarded.

Disregarding the conclusions, recitals, and allegations mentioned, said amended sixth paragraph charges that appellee's injuries were caused by the negligence of those "in the control, management, and direction of" the work car and the car which ran into it. The persons in charge of said cars, as we have already shown, were, regardless of the names or titles by which they were designated, fellow servants of appellee, and, if appellee was injured by their negligence as alleged, appellant was not liable therefor. It is a well-settled rule in this State that an employee who knows, or by the exercise of ordinary care could know, of any defects or imperfections in the place, ways, machinery, appliances, tools, or other things about which he is employed, or the want of capacity or the negligent habits of a fellow servant, and continues in the service without objection and

without a promise of change, is presumed to have assumed the risks resulting from such defects or imperfections or fellow servant's want of capacity or negligent habits, and cannot recover for injuries caused thereby. The rule does not require that the employee search for latent defects in the ways, machinery, appliances, tools, or other things about or with which he works, or the hidden dangers of the place where he is engaged in the line of his duty, but it goes to the extent that he assumes the consequences resulting from such defects as are patent, and such as are known to him, and such as by the exercise of ordinary care he could discover. *Wabash R. Co. v. Ray*, 152 Ind. 392, 400, 401, 51 N. E. 920. It has been uniformly held, therefore, that in an action by an employee against his employer for injuries received while in his employment, a complaint, to be sufficient, must allege that he had no knowledge of such defects or imperfections, or fellow servant's want of capacity, or negligent habits; and if he have such knowledge he must allege facts which show a sufficient reason for continuing in such employment. 1 Woollen's Trial Proc., §§ 1350, 1352, and cases cited; *Stone v. Bedford Quarries Co.*, 156 Ind. 432, 60 N. E. 35; *Hall v. Bedford Quarries Co.*, 156 Ind. 460, 60 N. E. 149; *Cleveland, etc., R. Co. v. Parker*, 154 Ind. 153, 56 N. E. 86, and cases cited; *McFarlan Carriage Co. v. Potter*, 153 Ind. 107, 53 N. E. 465; *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 299, 300, 53 N. E. 235; *Louisville, etc., R. Co. v. Kemper*, 147 Ind. 561, 47 N. E. 214, and cases cited; *Peerless Stone Co. v. Wray*, 143 Ind. 574-577, 42 N. E. 927, and cases cited; Boone's Code Pleading, § 169. Under this rule none of the paragraphs of the complaint states facts sufficient to constitute a cause of action at common law.

While it is sufficient to allege in the complaint a want of knowledge on the part of the injured employee, to sustain such allegation the evidence must show that the injured employee not only had no knowledge of the defect or imperfection in the machinery, appliances, tools, and other things about which he was employed, or of the fellow servant's incompetency or recklessness complained of, but could not have had such knowledge by the exercise of ordinary care. *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 299, 300, 53 N. E. 235, and cases cited. In

an instruction to the jury, however, it is error to say that want of knowledge on the part of the injured employee will enable him to recover against his employer, for this limits the employee's assumption of risk to things of which he has actual knowledge. If he had such knowledge, or could have had by the exercise of ordinary care, he cannot recover. It is error, therefore, in instructions to the jury to limit the injured employee's knowledge to actual knowledge; for implied knowledge, such as could have been acquired by the exercise of ordinary care, has the same force and effect as actual knowledge. *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531, 533-535, 53 N. E. 763, and cases cited; *Chicago, etc., R. Co. v. Glover*, 159 Ind. 166, 62 N. E. 11, and cases cited. For this reason two of the instructions given to the jury were erroneous.

As none of the paragraphs of complaint states a cause of action under the Employers' Liability Act of 1893 (§ 7083, Burns' Rev. Stat. 1901), it is unnecessary to decide whether or not said act, or any part thereof, applies to street and inter-urban railroads. For a discussion of this question, see *Sams v. St. Louis, etc., R. Co.* (Mo.), 73 S. W. 686, 61 L. R. A. 475; *Savannah, etc., Co. v. Williams* (Ga.), 43 S. E. 751, 61 L. R. A. 249; Dresser's Employers' Liability Act, § 80, pp. 349, 350, and cases cited. Other questions are argued, but, as they may not arise on another trial of the cause, they are not considered.

Judgment reversed, with instructions to sustain appellant's demurrer to each paragraph of the amended complaint.

Fort Wayne Traction Co. v. Morvilius.

(Indiana — Appellate Court, Division No. 1.)

INJURY TO PASSENGER ALIGHTING FROM CAR AT DANGEROUS PLACE; EXCAVATION IN STREET.¹—Street railway companies are bound to use the highest degree of care and skill and the utmost foresight in the performance of their duties as common carriers in receiving, transporting, and discharging their passengers, and are responsible for any injury

1. Passenger alighting in unsafe place.—The relation of a passenger of a street car terminates upon his succeeding in getting a footing upon the street which he can maintain. *Nellis Street Railroad Accident Law*, p. 46. After

to a passenger through neglect of any reasonable precaution for the prevention of such injury. So where a street railway company having knowledge of the dangerous condition of a street permits a passenger to alight without informing him as to the danger, resulting from an excavation in a street, it is liable for the injuries caused thereby.

APPEAL by defendant from judgment for plaintiff. Decided October 13, 1903.
Reported (Ind. App.), 68 N. E. 304.

Barrett & Morris, for appellant.

Henry Colerick, for appellee.

Opinion by BLACK, J.

The appellee recovered judgment against the appellant for damages for a personal injury. The complaint showed at length and with particularity that the appellee was a passenger on the car of the appellant, which was propelled by electricity west-

the passenger has departed from the car. and has had reasonable time and opportunity to avoid further danger from the operation of the car, or further necessity of relation with the servants of the carrier, he ceases to be a passenger and stands toward the carrier as one of the general public. 6 Cyc. 542, and cases cited in note 44.

But a street car company is liable for injuries to a passenger when guilty of negligence in respect to providing a safe place to alight, where such passenger fails to effect a landing upon the street and falls upon the parallel track, as a result of his attempt to land, and is run over by a car upon such track. *Brunswick & N. R. Co. v. Moore*, 101 Ga. 684, 28 S. E. 1000; *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406; *Louisville R. Co. v. Parke*, 96 Ky. 580, 29 S. W. 455.

Where by reason of the old rails of a street railroad being in process of replacement by new ones, a passenger is obliged to leave its car before reaching her destination, and after leaving the car steps on one of a number of rails laid by the railroad company in a continuous line along the side of the street, the railroad company is liable to the same extent as in the case of an injury to a passenger. *Wells v. Steinway Ry. Co.*, 18 App. Div. (N. Y.) 180, 45 N. Y. Supp. 864.

Where a street railway company excavates and leaves open trenches in a public street it owes a duty to the traveling public, including those desiring to alight from street cars, to exercise reasonable care to guard the trenches and give notice or warning of the danger. *Wolf v. Third Ave. R. Co.*, 67 App. Div. (N. Y.) 605. And where a carrier is bound by contract to pave and

ward on Main street, and had paid his fare, and had received from the conductor a transfer ticket entitling him to be carried on another car on Calhoun street northward from its intersection with Main street, between 9 and 10 o'clock at night. The car stopped on Main street, on the east line of Calhoun street, and the appellee descended for the purpose of taking the other car, then waiting for passengers so transferred. Main street, at that place, between the car track thereon and the curb of the sidewalk, upon each side of the street, had been dug down and excavated more than eighteen inches, leaving the foundation or bed of the street at that place three feet below the nearest step of the car. The appellee had not been in that part of the city for many months, and did not know of such condition of the street. The night was dark, and the shadow of the car from the lights on Calhoun street covered the excavation at the place of the steps. The appellee left his seat and went to the car step, to leave the

keep in repair the street between its rails, it is liable to a person for injuries sustained by accidentally stepping into a hole in the street between the tracks, after leaving the car, where the hole has been in existence and visible for a week. *Mahnke v. New Orleans, etc., R. Co.*, 104 La. 411, 29 So. 52.

In the case of *Lee v. Boston Elev. Ry. Co.*, 182 Mass. 154, 65 N. E. 822, a street railway company, in excavating under the direction of commissioners of highways for the purpose of laying a new track, made a ridge of earth between its track and the sidewalk, and a passenger in alighting from a car stepped on the ridge, and instead of going toward the sidewalk took a step toward the excavation, and the earth composing the ridge gave way, causing her to fall, it was held that the defendant was guilty of negligence. In the case of *Joslyn v. Milford, etc., Ry. Co.* (Mass.), 1 St. Ry. Rep. 323, 67 N. E. 866, it appeared that a street car stopped beyond a crossing at a place where the carrier had exclusive control over the portion of the highway next to the tracks, and a passenger in attempting to alight was injured by an embankment giving way, he not being cautioned as to the security of the footing, and it was held that the act of stopping the car at such a place being an implied invitation to alight and an implied representation that the place was safe, the company was guilty of negligence.

See also as to the duty of street railway companies to provide a safe place for passengers to alight: *Leveret v. Shreveport Belt Line Co.* (La.), 1 St. Ry. Rep. 253 (and note on page 254), 34 So. 579; *United Railways & Elec. Co. v. Woodbridge* (Md.), 1 St. Ry. Rep. 281, 55 Atl. 444; *Lynch v. St. Louis Transit Co.*, 2 St. Ry. Rep. 322, (Mo. App.) 77 S. W. 100; *Cotant v. Boone Sub. Ry. Co.*, 2 St. Ry. Rep. 269, (Iowa) 99 N. W. 115.

car. He placed his left foot on the lowest step, and reached with his right foot for the ground, and discovered that he could only reach it with his toe; and, having the whole of his weight placed upon his left foot, he could not remove it in order to jump, when by reason of such condition his body became overbalanced, and he fell to the ground from the step, upon his face and right hand, striking the ground violently, and then rolled on his back, when, upon attempting to arise, he found that his right hand and arm were useless and helpless by reason of the fall. It was alleged that the appellant knew, and ought to have known, that the street had been so excavated at the point where it stopped its car for its passengers to alight, but that the appellant, knowing of such dangerous condition of the street at that point, and knowing, as it did, that it was dangerous for passengers to alight from the car at that point, carelessly and negligently stopped at that point for its passengers to leave the car, knowing of the danger as aforesaid, and carelessly and negligently did so without providing any light or other warning to its passengers, and that its conductor and those operating its car negligently and carelessly omitted and failed to warn the appellee or any of its other passengers on that car of such dangerous condition of the street at that point to those attempting to leave the car there. The complaint contained other averments relating to the appellee's injury, and concerning the amount of damages.

Counsel for appellant have discussed the complaint and the evidence, and an instruction which the court refused to give to the jury. The substance of the whole discussion is thus stated in the appellant's brief: "The record in this case presents clearly and cleanly for decision this question: Where an electric [company] operates its cars on tracks in a city, and excavations are made by the city on parts of the street adjacent to such track, is it the duty of the servants of the railway to notify passengers alighting from the cars of such excavation, when the cars are stopped to let off passengers immediately opposite such excavation? We insist not." The case to which counsel have called our attention, in which the person complaining of the common carrier of passengers was injured by reason of the defectiveness of the street after having alighted from the conveyance,

and while proceeding along or across the street, and where, therefore, the relation of carrier and passenger had wholly terminated, is not in point in the case at bar. The strict obligation of the carrier of passengers continues not merely while the passenger is being received and being carried, but also while he is leaving or alighting from the carriage or car under such circumstances that it may properly be said of him that he is being so discharged or so landed by the carrier. The relation of carrier and passenger had not ceased when the appellee received his injury under the circumstances detailed in the complaint. The action does not proceed upon the theory of responsibility of the appellant for the excavated and dangerous condition of the street. The plaintiff does not rely upon the theory of the actionable wrong of a person or corporation in producing or maintaining such a condition of the street, resulting in injury as stated in the complaint; but the case proceeds upon the theory of the responsibility of the carrier for discharging its passengers at such a dangerous place, of whose dangerous character it knew or was bound to take notice, without properly guarding him from injury, or warning him of the danger of which he was ignorant, and concerning which, under the circumstances, he was not bound to take notice. The suggestion of the appellant concerning the nature of the action is palpably erroneous. The appellant, through its servants in charge of the car, having knowledge of the condition which rendered the alighting in the dark from the car dangerous for passengers who were ignorant of the excavation, owed the passenger the duty of taking reasonable precautions or giving reasonable warning for the protection of the passenger. Common carriers of passengers, including street railway companies, are bound to exercise the highest degree of care and skill and the utmost foresight in the performance of their duty as carriers, in receiving, transporting, and discharging their passengers, and are responsible for any injury to a passenger through neglect of any reasonable precaution for the prevention of such injury. *Citizens' St. R. Co. v. Twiname*, 111 Ind. 587, 13 N. E. 55.

Judgment affirmed.

Indianapolis & Greenfield Rapid Transit Co. v. Haines.

(Indiana — Appellate Court, Division No. 1.)

1. **INJURIES CAUSED BY HORSES FRIGHTENED BY ADVERTISING BANNER ATTACHED TO CAR.**¹—The plaintiff alleged that he was injured because of his horses taking fright at a banner attached for advertising purposes to a street car of the defendant, which banner was so constructed as to attract the notice of and frighten horses unaccustomed thereto.
2. **CONTRIBUTORY NEGLIGENCE; BURDEN OF PROOF.**—An instruction that the burden is upon the defendant to prove contributory negligence, if any, upon the part of the plaintiff, while erroneous, cannot be deemed harmful where there was no evidence showing that the plaintiff was guilty of contributory negligence.
3. **INSTRUCTION AS TO THEORY OF PLAINTIFF'S CAUSE OF ACTION.**—An instruction to the effect that if the plaintiff recovers he must recover upon the theory of his complaint, and that he must prove by a fair preponderance of all the evidence given in the cause that such horses were frightened at the sign and banner on the car, and not from any other cause, and that it was not necessary to the proper and successful operation of said railroad that the defendant should have placed said sign and banner on the car, is not erroneous, although it might be said to be incomplete.
4. **EVIDENCE AS TO SIZE OF BANNER.**—Where it appeared that all the banners used to advertise the particular object were of the same size, testimony of witnesses other than the plaintiff as to the size and character of these banners is admissible.
5. **EVIDENCE AS TO CAUSE OF HORSES' FRIGHT.**—The evidence as to the cause of the horses' fright was considered and deemed sufficient to support the conclusions reached by the jury.

APPEAL by defendant from judgment in favor of plaintiff. Decided December 10, 1903. Reported (Ind. App.), 69 N. E. 187.

Wm. A. Brown and Binford & Walker, for appellant.

Forkner & Forkner and Marsh & Cook, for appellee.

Opinion by ROBINSON, J.

Suit for personal injuries. Appellee avers in his complaint that the appellant's track runs along and upon a public highway

1. As to horses frightened by negligent operation of street car, see: *Lincoln Traction Co. v. Moore*, 2 St. Ry. Rep. 642, and note, (Nebr.) 97 N. W. 605; *Adsit v. Catskill Elec. Ry.*, 2 St. Ry. Rep. 785, 88 App. Div. (N. Y.) 167, 84 N. Y. Supp. 393; *Cameron v. Jersey City, etc., St. Ry. Co.*, 2 St. Ry. Rep. 732, (N. J. L.) 57 Atl. 417; *Knoxville Traction Co. v. Mullens*, 2 St. Ry. Rep. 875 (Tenn.) 76 S. W. 890; *Romine v. San Antonio Traction Co.*, 2 St. Ry. Rep. 898, (Tex. Civ. App.) 77 S. W. 35.

known as the "Old National Road;" that appellant's cars are propelled by electricity, and the usual speed at which the cars are run is about twenty-five miles per hour; that on the 8th day of October, 1900, appellee was driving along the highway in a spring wagon, with a top attached, drawn by one horse; that he was driving in a prudent and careful manner, and had the horse completely under his control; that while so driving one of appellant's cars approached appellee, which car had attached to the front end thereof a large banner, composed of white cloth or muslin, upon which were printed large, black letters, advertising a street carnival which was at that time about to be given or was being held in the city of Indianapolis; that the place where appellee received his injuries, as hereinafter stated, was in the public highway, and upon the railroad track, at a point about three and one-half miles west of the city of Greenfield, to which place appellee was traveling; that the body of the car was painted a light ocher, "which was a strong background for displaying the banner or advertisement, which, together with the motion and speed of the car, agitated the same in such a manner as rendered it highly dangerous, and well calculated to attract the notice, and frighten horses unaccustomed thereto," passing along the highway; that appellee's horse was gentle, and accustomed to the approach and passage of cars in the ordinary way, but was not accustomed to the carrying of any extraordinary contrivances for the purpose of attracting the attention of the public; that the banner was not necessary for the proper management or running of the car, or in any manner required in the operation of the road, but was a method negligently and carelessly adopted and being used by the appellant of advertising the street carnival along its route; that when appellee observed the approach of the car, anticipating that the horse might become frightened, he had the horse under complete control, but, when the horse saw the same rapidly approaching, he became and was frightened by such sign, and became uncontrollable, turned upon the railroad track, and upset the wagon in which appellee was sitting, throwing appellee upon the track and under the wagon, all through the fault, negligence, and carelessness of the appellant as aforesaid; that appellee, through the appellant's "fault, negligence, and carelessness as aforesaid," sus-

tained serious and permanent injuries. The theory of the pleading is that the injury was caused by reason of appellee's horse becoming frightened at a sign or banner on the car which appellee met while driving along the highway, and that the sign or banner was not necessary to the operation of the car. It is averred that the banner, together with the speed and motion of the car, which agitated the banner, made it dangerous, and calculated to attract the notice of and frighten horses unaccustomed thereto, passing along the highway; that the banner was not necessary in the proper management and running of the car, or in any manner required in the operation of the road, but was purely a method negligently and carelessly adopted and being used by appellant of advertising a street carnival along its route. The complaint sufficiently shows appellant's negligence, and states a cause of action.

It is argued that certain instructions were erroneous, and that certain evidence was erroneously excluded.

The court gave the following instruction: "(4) The burden is upon the defendant to prove contributing negligence, if any, upon the part of the plaintiff." In *Indianapolis, etc., Ry. Co. v. Taylor*, 158 Ind. 274, 63 N. E. 456 — an opinion written since the case at bar was tried — an instruction reading, "But the burden of proving contributory negligence on the part of the plaintiff rests on the defendant," was held erroneous. "It is sufficient," said the court in that case, "to call attention to the inaccuracy of any instruction that requires, in express terms or impliedly, that the contributory negligence of a plaintiff must be proved by the defendant. The jury should be informed that it is sufficient if the contributory negligence of the plaintiff is proved by a preponderance of the evidence, without regard to whether such evidence was given by the plaintiff or defendant, or by both." In the above case it was said that an examination of the record might show that the giving of the instruction did not mislead the jury, and was harmless error; and it was there held that, as the judgment should be reversed because of other erroneous instructions, it was not necessary to examine the record for that purpose. A careful examination of the evidence in the case at bar fails to disclose any evidence given by appellee or his wit-

nesses that could be construed as showing contributory negligence on the part of appellee. The court properly instructed the jury that if appellee was injured as alleged, and appellant's negligence was the proximate cause of the injury, he could not recover, if by his own fault or negligence he contributed thereto. As there was no evidence given by appellee or his witnesses that could reasonably be said to show contributory negligence, and as the only evidence upon that question was from appellant's witnesses, we must conclude that, while the instruction would seem to be erroneous under the above ruling, the error in giving it was not harmful to appellant. See *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898, and cases cited in note pages 969, 970; *Washington, etc., R. Co. v. Tobriner*, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284.

Complaint is made of the following instruction: "The theory of the plaintiff's cause is that his injury was caused by reason of his horse being frightened at a sign or banner on the front end of the car of defendant, which he met while driving said horse on said highway, and that said sign and banner was not necessary to the operation of said car. If the plaintiff recovers, he must recover upon the theory of his complaint, and unless it is proven by a fair preponderance of all the evidence given in the cause that such horse became frightened at the sign and banner on said car, and not from any other cause, and that it was not necessary to the proper and successful operation of said railroad that the defendant should have placed said sign and banner on said car." The instruction might be said to be incomplete, but is not for that reason erroneous. It purports only to give briefly the theory of appellee's cause of action, and does not undertake to enumerate the facts necessary to be proven to entitle appellee to recover. When taken in connection with the other instructions given, there is nothing in it that would tend to mislead the jury.

Instruction No. 8 given by the court is as follows: "If the defendant was operating an interurban railroad on and along a public highway, and if, while running its cars along and upon its said railroad, plaintiff's horse became frightened at the running of said car, or at the appearance of said car, aside from

said sign or banner, and said car was being run and operated in the ordinary way of operating said car, then the court instructs you that such fright of said horse under such condition could not be chargeable to the defendant." It would be a strained construction of the language used in this instruction to say that the jury would understand it to mean that appellee might recover if his horse became frightened at the running of the car unless it was shown that the car was being run and operated in the ordinary way of operating the car. The court, in other instructions, correctly told the jury the theory of appellee's action, and correctly enumerated the facts necessary to be proven by appellee to entitle him to recover. A careful consideration of the instructions discloses nothing prejudicial to appellant. The instructions requested and refused, so far as applicable, were included in those given by the court. The instructions given by the court are sufficiently full, and are clear, concise, and brief — a practice to be commended in instructing juries.

Complaint is made of certain evidence admitted, and excluding certain evidence offered by appellant. Appellee testified that the banner at which the horse became frightened was an advertisement of the carnival at Indianapolis, and was about three feet square. Certain witnesses introduced by appellee testified as to the size of these carnival banners, or advertisements of the carnival. Their examination in chief was confined to a description of these particular banners or advertisements, and it seems, from the evidence, that all these carnival banners or advertisements were alike. There was no error in permitting these witnesses to describe the banner or advertisement. The court stated that similarity could not be proven, but that it could be shown the kind of banners that were on the cars for the purpose of proving the kind of banner in question. The evidence of these witnesses upon direct examination was not to the effect that different advertisements were used on other cars at the time of the accident and subsequent thereto. Upon cross-examination by appellant, statements were made by the witnesses, in answer to questions, concerning other banners on the cars during the same week. Excluding evidence afterward offered by appellant for the purpose of contradicting these statements was not reversible error. It

was not the theory of the complaint that an unusual banner was being carried at the time, but, as stated by the court in an instruction, it was that the injury was caused by reason of the horse becoming frightened at a sign or banner on the front end of the car which he met on the highway, and that the sign or banner was not necessary to the operation of the car. The jury answered to interrogatories that the advertisement on the front end of the car was twenty-two by thirty inches, made of white paper, with black letters and figures for dates; that the evidence shows that the horse became frightened at the advertisement; that the car was about 200 feet away from appellee when the horse first became frightened, and was about 100 feet away when the accident happened; that the car was standing still, and had been standing a few seconds, when the accident occurred; that appellant's track was on the south side of the highway, which was eighty feet wide, and practically level; that appellee could not have driven north of the graveled part of the road, and by so doing have avoided the injury; that appellee was not attempting to force the horse into close proximity to the track. There is evidence to support the conclusions reached by the jury. What did in fact frighten the horse was a question solely for the jury. There is some evidence authorizing the jury to conclude as it did. We cannot interfere with the conclusion there reached. We find no error in the record authorizing a reversal.

Judgment affirmed.

Union Traction Co. v. Vandercook.

(Indiana — Appellate Court, Division No. 1.)

1. COLLISION WITH VEHICLE CROSSING TRACK; FAILURE TO STOP BEFORE CROSSING.¹—The plaintiff, while attempting to drive across the tracks of the defendant, was struck by one of its cars and injured. It was alleged that at the time he attempted to cross no car could be seen or heard, although he could see for a distance of 128 feet up the track; that the car was approaching at a speed of at least forty miles an hour;

1. Duty to stop before crossing track.—Persons driving across street railway tracks are not obliged, as a matter of law, to stop, look, and listen before crossing, unless there are some circumstances which would make it ordi-

that no signal or warning was given; that the car was more than 250 feet away when the plaintiff first drove his horse upon the crossing; that the car could have been stopped within a distance of seventy-five feet at any time after the plaintiff's horse had gone upon the track. It was held that the allegations were sufficient to establish negligence on the part of the defendant. Under the circumstances it was the motor-man's duty to stop the car if necessary to prevent an accident, and the plaintiff's failure to stop before crossing the track was not contributory negligence as a matter of law.

2. EVIDENCE AS TO SPEED.—The question being in dispute as to whether the car was running at a high and dangerous speed, and as to whether such speed was so great as to constitute negligence, it was proper to admit evidence as to the speed of the defendant's cars at the place where the accident occurred for ten days prior to such accident.

APPEAL by defendant from judgment for plaintiff. Decided January 15, 1904. Reported (Ind. App.), 69 N. E. 486.

James A. Van Osdol, Wm. A. Kittinger, Arthur W. Brady, and Rollin Warner, for appellant.

Bingham & Long, for appellee.

Opinion by ROBINSON, J.

Suit by appellee for personal injuries. The complaint, which was held sufficient against a demurrer for want of facts, avers, in substance, that an ordinance limited the speed of appellant's cars to ten miles an hour between street crossings, and to six miles an hour at crossings; that appellant's track crossed White river on a bridge parallel with, and immediately north of High street wagon bridge; that at a point about sixty-eight feet south-east of the south end of these bridges appellant maintained a public street crossing across its tracks, leading from High street, a principal street; that on account of the close proximity of the two

narily prudent. *Cincinnati St. R. Co. v. Whitcomb*, 66 Fed. 915. Ordinary care to discover an approaching street car by looking and listening is all that is required of a driver. *Stanley v. Cedar Rapids R. Co.* (Iowa), 93 N. W. 489. For cases reported in this series relating to the duty to look and listen before crossing a street railway track in front of an approaching car see note to *Chicago City Ry. v. O'Donnell*, *ante*, page 172.

Evidence as to speed.—As to opinion evidence relating to speed of street cars, see note to *Reagan v. Manchester St. Ry. Co.*, *post*, page 662.

bridges, and the manner of their construction, a person traveling northwest on high street could not see an approaching car for more than 150 feet northwest of the bridge, and while it was crossing the bridge, and until it came within sixty feet of the southeast end; that appellee was unable to see the car until it reached a point sixty feet northwest of the south end of the bridge as he entered upon the crossing, all of which appellant knew; that appellant at all times, except when appellee was injured, sounded the gong upon approaching the crossing, which appellee knew; that appellee, seated in a rubber-tired, open, single road wagon, with due care and caution, looked and listened for cars before going upon the crossing; that no car could be seen or heard by appellee, though he could see a distance of 128 feet up the track; that at the time there was no car within 250 feet of the crossing; that the car had approached sufficiently near to be obscured by the bridge when appellee entered upon the crossing; that, because of the wind, appellee was unable to hear the approach of the car when more than 150 feet from the crossing; that, while looking and listening, appellee started across the crossing, when appellant, by its servants, negligently and wrongfully, without sounding the gong or giving any signal or warning, ran the car at a speed of forty miles an hour at and against appellee, whereby he was injured; that after he saw the car he unsuccessfully tried to avoid being struck; that appellant's motorman in charge of the car saw appellee's horse upon the crossing when the car was over 200 feet away; that the car was more than 250 feet away when appellee first drove his horse upon the crossing; that the car could have been stopped within a distance of 75 feet at any time after appellee's horse entered upon the track at the crossing; that appellee's injury was the result of appellant's negligence in running the car at the unlawful rate of speed, not keeping the same under proper control, and in not stopping the same before reaching the crossing, all without appellee's fault or negligence. We do not think the complaint open to the objection that the particular averments of what appellee did, show his own negligence contributed to his injury. It is averred that he looked and listened as he approached the crossing, and that, as he started to cross, there was no car within 250 feet of the crossing. He did not

know that a car was approaching. No gong was sounded, nor warning given. Under the circumstances existing at the time, he had the right to assume that he could safely pass over the crossing. But it cannot be said, as matter of law, under the circumstances surrounding appellee at the time, that he was negligent in attempting to cross over the crossing. In determining his conduct at the time, he could not be held to presume that, if a car did approach the crossing, it would be running at a high and dangerous rate of speed. From the averments it appears that there was no car near when appellee started over the crossing. It is averred that the motorman saw appellee's horse upon the crossing when the car was 200 feet away, and that the car could have been stopped within a distance of seventy-five feet at any time after the horse entered upon the crossing. Under such circumstances, it was the motorman's duty to stop the car, if necessary to prevent an accident. It is not every act of negligence on the part of a person injured that will defeat a recovery, but only such negligence as materially contributes to the accident. *Citizens' St. Ry. v. Abright*, 14 Ind. App. 433, 42 N. E. 238, 1028. The complaint states a cause of action.

The jury answered interrogatories that the accident happened at a public crossing, which all cars approached from the northwest, running every twenty minutes, which appellee knew. Appellee drove northwest at seven or eight miles an hour until he turned to cross the tracks, when he was going five or six miles an hour. The car which struck appellee was about 100 feet from the southeast end of the bridge when appellee started to turn his horse to cross the tracks. The crossing was sixty-seven feet from the southeast end of the bridge. After appellee turned his horse to cross the tracks, and before the horse entered upon the crossing, appellee looked and listened for a car, but did not stop his horse. The cars stopped regularly at the crossing to take on and discharge passengers. Appellee knew that the sides of the two bridges obscured to some extent the view of a car approaching from the northwest. He did not know the rate of speed at which cars approached and ran over the crossing. "(75) If plaintiff had stopped and looked to the northwest, along said railroad, at any time after he began to turn his horse to the right, and before

his horse entered upon said railroad track, could he have seen the approaching car in time to have avoided the injury? Ans. Yes; if he had stopped." "(77) If plaintiff had stopped and listened for an approaching car at any time on said occasion when within ten feet of the point where he began to turn to go over said crossing, and before his horse entered upon the same, could he have heard said car in time to have avoided the injury? Ans. Yes; if he had stopped." We think it unnecessary to enter upon a discussion as to whether these answers show that appellant's failure to stop before reaching the crossing was a want of due care on his part, as the jury answered other interrogatories as follows: "(76) Did plaintiff on that occasion at any time after he turned to the right, and before his horse entered upon said crossing, stop and look to the northwest for an approaching car? Ans. He looked, but did not stop." "(66) If the plaintiff had looked on that occasion to the northwest at any time after he had turned his horse to the right, and before his horse entered upon the tracks of said street railway, could he have seen the approaching car in time to have avoided the injury? Ans. No. (67) If plaintiff had stopped his horse at any time on that occasion after he reached the point where he turned to the right to cross said tracks, and before his horse entered upon the same, could he, by either looking or listening, have learned that a car was approaching, in time to have avoided the injury? Ans. No." Authorities need not be cited in support of the propositions that the general verdict determines all material issues in appellee's favor; that all reasonable presumptions will be indulged in favor of the general verdict, and none indulged in favor of the answers to the interrogatories; that, if the answers are to control, they must be in irreconcilable conflict with the general verdict; that, if answers are antagonistic or inconsistent, they neutralize each other, and will be disregarded; and that the answers override the general verdict only when both cannot stand, the conflict being such as to be beyond the possibility of being removed by any evidence admissible under the issues.

When appellee turned to go upon the crossing, the car was more than 160 feet away. He did not know a car was approaching at the rate of forty miles per hour. Had he seen the car when that

distance away, and there was nothing to lead him to believe that it was running any faster than the ordinary rate of speed, his attempt to cross the track in front of the car would not have been, as matter of law, negligence. An attempt to cross in front of a street car running at an ordinary rate of speed, fifty feet distant, is not, as matter of law, negligence. *Wells v. Brooklyn, etc., Ry. Co.*, 58 Hun, 389, 12 N. Y. Supp. 67. Appellee had the right to cross the track, and his right was not inferior to appellant's right to pass over the crossing. Each was required to exercise his right so as not to interfere with the right of the other. *Citizens' St. R. Co. v. Damm*, 25 Ind. App. 511, 58 N. E. 564. In *Cincinnati St. Ry. Co. v. Whitcomb*, 66 Fed. 915, 14 C. C. A. 183, it is held that it is not the law that persons crossing street railway tracks in a city are obliged to stop, as well as look and listen, before going over such tracks, unless there is some circumstance which would make that ordinarily prudent. See also *O'Neal v. Dry Dock, etc., R. Co.* (N. Y.), 29 N. E. 84; *Evansville, etc., R. Co. v. Gentry*, 147 Ind. 408, 44 N. E. 311, 37 L. R. A. 378, 62 Am. St. Rep. 421. The rule is well settled that a street railway crossing is a place of danger, and that a person approaching such a crossing is required to use the caution of an ordinarily prudent person. He must look and listen before attempting to cross, but whether he must stop must depend upon the circumstances of the particular case. See *Marchal v. Indianapolis St. Ry. Co.*, 28 Ind. App. 133, 62 N. E. 286, and cases there cited. While the failure of those in charge of the car to give the required signals would not excuse appellee from the exercise of due care, yet the jury might consider that fact, in connection with all the circumstances attending the accident, in passing upon the conduct of appellee. *Louisville, etc., R. Co. v. Williams*, 20 Ind. App. 576, 51 N. E. 128. The jury found by the general verdict that appellee was in the exercise of due care, and the interrogatories cannot be said to be inconsistent with that finding.

Witnesses were permitted to testify, over appellant's objection, as to the speed of appellant's cars at the place in question for ten days preceding the accident. The complaint averred that the car was running at the high and dangerous speed of forty miles an hour. The question before the jury was whether the speed of

the car at the time and place of the accident was so great as to amount to negligence. There was some conflict as to the rate of speed of the particular car. Under such circumstances, it has been held in this State that the evidence above complained of is admissible. In *Chicago, etc., R. Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218, the precise question here presented was determined adversely to appellant. In that case the court said: "We do not think this evidence prejudiced the case of appellant. The accident occurred on the 18th day of October. The question before the jury was whether the speed of the train on that day, at the time and place of the accident, was so great as to amount to negligence on the part of appellant. There was some variation in the evidence as to the exact rate of speed on that occasion. The evidence here objected to was by way of comparison, that, by knowing how the vestibule train ran on other days about that time, particularly close before the day of the accident, the jury might have some aid in judging how fast the train did run on the day in question." The doctrine of the above case has not been overruled. It is applicable to the point in question, and is controlling here.

Judgment affirmed.

Indianapolis Street Railway Co. v. Darnell.

(Indiana — Appellate Court, Division No. 2.)

1. COLLISION WITH VEHICLE; CIRCUMSTANTIAL EVIDENCE.¹—The plaintiff, a milkman, while driving his wagon along the defendant's tracks was injured by a collision with one of its cars. The wagon was inclosed with doors in the center, one on each side. From the evidence it appeared that the plaintiff looked back a number of times to see whether a car was approaching. The speed with which the car approached was shown to have been excessive, and it did not appear that there was any ob-

1. Negligence inferred from circumstances of collision.—A street railway company which runs down a wagon being driven along its tracks, plainly visible in front of the car, is guilty of negligence in the absence of special circumstances. *Vincent v. Norton & T. Ry. Co.*, 180 Mass. 104, 61 N. E. 822; *Schilling v. Metropolitan St. Ry. Co.*, 47 App. Div. (N. Y.) 500, 62 N. Y. Supp. 403. In the case of *Warren v. Union Ry. Co.*, 46 App. Div. (N. Y.)

struction upon the track preventing the motorman from observing the plaintiff's wagon. It was held that it being the duty of the motorman to have the car under such control that it may be stopped within a short distance if the occasion requires, the jury might infer from his failure to exercise reasonable care, that he was negligent; that the jury might infer in the absence of evidence explaining the accident that it was due to the motorman's carelessness.

2. CONTRIBUTORY NEGLIGENCE; FAILURE TO LOOK BEHIND.—Under the circumstances of the case it was held not contributory negligence for the plaintiff while driving along the defendant's track not to constantly look behind him for approaching cars. He may be presumed to have known that his wagon was plainly visible to the motorman, and that without special circumstances which do not appear, the railway company could only have run him down carelessly or willfully.

APPEAL by defendant from judgment for plaintiff. Decided October 27, 1903.
Reported (Ind. App.), 68 N. E. 609.

Winter & Winter, Oscar Matthews, and W. H. Latta, for appellant.

Elliott, Elliott & Littleton, for appellee.

Opinion by COMSTOCK, J.

Appellee brought this action in the Superior Court of Marion county against appellant for damages caused by appellant running its car against appellee's wagon and injuring his person. It is charged that appellant was negligent in the operation of its car. The trial was had in the Circuit Court of Morgan county upon a change of venue before a jury, and a verdict returned

517, 61 N. Y. Supp. 1009, the plaintiff's evidence tended to show that he was seated in a grocery wagon, the back and sides of which were inclosed by oilcloth curtains, and was driving along a certain street, each side of which was either out of repair or incumbered with rubbish, so that the passable part of the roadway ran so close to the defendant's car tracks that the wheels of the defendant's wagon were only about a foot from it; that while so driving along said roadway a car of the defendant came up rapidly from behind, without warning, and struck the plaintiff's wagon, throwing it over and seriously injuring him; it was held that a dismissal of the complaint at the close of the defendant's testimony was error.

While the general rule is that in an action for personal injuries negligence will not be presumed but must be proven (*State v. Philadelphia, etc., R. Co.*, 60 Md. 555; *Lyndsay v. Connecticut & P. R. Co.*, 27 Vt. 643), yet negli-

upon which judgment was rendered in favor of appellee for \$6,000. It was charged in the complaint that appellee drove said vehicle upon the street-car tracks of the appellant on West Morris street, in the city of Indianapolis, and there stopped and waited for a freight train to cross the street and get out of his way; that "while upon said track * * * waiting for said freight train to pass, * * * being in said vehicle, * * * defendant's car ran against the same."

Numerous errors are assigned, but in the oral argument counsel for appellant stated that the court would be asked only to pass upon the sufficiency of the evidence to sustain the verdict. Appellant introduced no evidence. At the conclusion of appellee's evidence, appellant moved the court to instruct the jury to find for the defendant. Appellee offered no evidence as to the manner of the accident but his own. His testimony is substantially as follows:

"I live at 1305 Belmont avenue. Am fifty-one years of age, and in the milk business. On September 7, 1900, I left home about a quarter past 4 in the morning. It took me about thirty minutes to drive to the Belt crossing. I saw the street-car tracks on Belmont avenue, where the cars turn; and all the time after I got on Reisner street I did not see any street cars. At that time in the morning cars run out there every hour. After I reached West Morris street, I drove east on the north side of Morris street — north of the tracks — to Harding street. Then I drove on the car track on the north side of the street to the switch, crossed over to the south track, and drove up to the belt on the south track. I drove within twenty-five feet of the belt — my person was within twenty-five feet; my horse's head within fifteen feet. As I was driving across the switch, I looked to see if any car

gence may be inferred from the happening of an accident which in the ordinary course of things would not have happened without negligence. *Peer v. Ryan*, 54 Mich. 224, 19 N. W. 961.

The law does not require direct or positive evidence of negligence. It may be inferred from circumstances adduced in evidence, and circumstantial evidence alone may authorize the finding of negligence. *Jacksonville, etc., Ry. Co. v. Peninsula, etc., Co.*, 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33; *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177; *Atchison, etc., R. Co. v. Brassfield*, 51 Kan. 167, 32 Pac. 814; *Alpern v. Churchill*, 53 Mich. 607, 19 N. W. 549; *Hart v. Hudson River Bridge Co.*, 80 N. Y. 622. As to the sufficiency of evidence in actions brought to recover for injuries caused by a collision between a vehicle and a street car, see *Nellis Street Railroad Accident Law*, p. 536.

was approaching from the west. I could see back beyond Reisner street, and there was no car between Reisner street and me. There was no obstruction to the view. The track is straight. There is a down grade from Reisner street to Harding street, and then it is upgrade to the belt. It is about 900 feet from Reisner street to the belt. There are two tracks on Morris street. Cars going east use the south track. West of the belt the roadway of Morris street had been worked over recently. They had put in new ties, and, instead of filling up, they had left the ends of the ties exposed, now and then, so that you could see them clear back on Harding street on the south side. The north side was very rough. Just west of the belt there is a dead track that leads from the belt to the switch. Just west of the belt there were a couple of crossties and some gravel between the south track and the dead track, and on the south side of the track there were long pieces of iron piled up extending back close to the sidewalk. There were two poles stood on the south side of the street, about twenty-five feet from the belt, and these irons stuck out about three feet beyond these poles. When I drove up, there were two vehicles standing in the north roadway, north of the north track—a two-horse wagon close up to the belt, and a spring wagon just behind it. The switch begins about seventy-five feet west of the belt. A long freight train obstructed my passage. As I passed the switch, the train began to pass over Morris street. I looked back to see if a car was coming, didn't see any, and passed over on the south side, and drove up to the belt and stopped. I remained in that position from three to five minutes. I looked back twice, I think, for cars. I think I looked the last time about half a minute before I was struck. I did not see a car at any time. When I looked I put my head out of the door of the wagon. I could see beyond Reisner street. All of the times when I looked I was sitting in the wagon. The doors of my wagon were in the center—one on each side. They were open. There was a glass all around the wagon sides, back and front, but the front glass had been taken entirely out, and the back window was drawn up open, and hooked to the top of the wagon. This glass was about twelve inches in width, and the back door there was drawn up and hooked on hooks put there for that purpose. Below the glass there were two doors that closed together in the middle. They were fastened. There was no room to drive a wagon south of the tracks and between them and the obstructions, and this condition was the same up to the belt. The belt crossing is boarded. It was the custom of the street railway company to stop their cars when nearly to the railroad, and the conductors get off and go forward and look up and down to see if there are obstructions, and then motion the car across. There was no obstruction to prevent a motorman seeing me, only my milk wagon. It was seven feet high. I was sitting in my wagon, on the south side of the wagon. I looked back twice, and saw no car. As I settled myself in my wagon, just turned around and looked up and down the belt, and just at that time the car struck me from the rear. It is my impression that it was one-half minute after I looked the last time until the car struck me. It was a very hard blow. As it struck the wagon

knocking it east, my head and shoulders came out through the opening where the glass was till my head came down below or near where the bumper of the street car was. At that time I saw the motorman with his hand on the brake, whirling it around as fast as he could. Then my head struck something, and next thing that I knew I was laying on the street by the sidewalk. I did not hear the car. The noise of the freight passing over the crossing prevented my hearing the car. I did not see the car approaching. After I revived I saw the car standing with my wagon just in front of it. The next I remember I was in the ambulance. After I got home I remember the doctor setting my shoulder. The cap of my shoulder was knocked off and broken. The round bone of the shoulder was fractured. I had two or three ribs broken. I had a knot on my head, and I was hurt in the throat, and my spine was hurt. It was daylight at the time of the accident, and a clear morning. I don't know what car struck me, but none run then except those of the Indianapolis Street Railway Company. I was in bed four weeks, confined to the house about two months, and after that went about with a cane or crutch. I have regained the use of my left shoulder, but there are some adhesions to be broken up. I had a paralytic stroke seven months after the accident. I can't taste anything. I sleep poorly. I have been to the city to market with a load of roasting ears since." Cross-examination: "I was entirely familiar with Morris street, and the location of the tracks, and the way in which the cars were operated there. I had known for a week before I was hurt of the obstructions in the street on both sides of the track, just west of the belt railroad. On that morning, when I got to Harding street, I turned upon the north street-car track. Before that I had been driving in the roadway. From Harding street to the switch I drove on the north track. As I got to the switch, I saw two vehicles in the roadway at the north side of the track. As I was passing over the switch I saw the freight train just beginning to go over the street. I was then about twenty-five feet west of the belt, and I there looked to see if a car was coming. I looked out of the right door of my wagon. I saw no car. I saw beyond Reisner street. I then drove up so that my horse's head was ten or fifteen feet from the railroad. I drove the distance in a walk. I knew when and before I went in there I could not drive off the track to the south without injuring my wagon; that the obstructions of the south side of the track would prevent my driving off there. I also knew when and before I drove in there that I could not drive off that track on the north side because of the obstructions. I also knew that I could not drive ahead for probably four or five minutes on account of the freight train. The reason in my mind when I was at the switch on account of which I did not drive on the north side of the street, behind that spring wagon, was that it was rough there, and I did not want to risk breaking my bottles. Nothing prevented me from driving there, and I might have stopped. I knew that no car could come and occupy the north track until the freight train passed. I also knew that any car from the west would come on the south track. I didn't think a car was liable to come. When I looked back,

it was through habit, and not because I expected to see a car. After I got up to the track I stopped and stood still until the accident. The horse was gentle, and at all times under my control and management. It was being driven by me. After the horse stopped, I looked back through the opening in the back of the wagon. Nothing obstructed the view. I saw beyond Reisner street, and saw no car. I had good eyesight and hearing. The freight train was making a great noise all the time. I knew that would interfere with my hearing an approaching car. I had good use of my limbs, and was an active man. All the time I was sitting on the seat of my milk wagon, three feet from the back end of the wagon. Both doors of the wagon were open. The doors were opposite my feet and knees. They were wide enough so that a man could readily get through them. The floor was seventeen inches above the ground. From my position it was one step out onto the ground. After I looked back the last time I sat facing east in the wagon. I looked up and down the belt, and then I was facing east. I did not see the car until after it had collided with the wagon. I did not hear it. I was ignorant of its approach. Nothing prevented me from getting out of the wagon if I had wanted to do so. I knew of the custom to stop the cars at the crossing, and had it in mind when I drove in there, but I was not expecting any car whatever. I was an active man. I had no difficulty in walking. I was not depending upon the fact that it was the custom to stop before crossing the tracks."

The general rule is that in an action for personal injuries the negligence of the defendant will not be presumed. There are exceptions to this rule, but the facts do not bring the case before us within them. Some negligence of the defendant must be shown which directly contributed to the injury. This may be done by direct or circumstantial evidence. It cannot be defined from any rules of evidence. It must be inferred from all of the facts of the case. A jury has the right to draw from the facts proven fair and reasonable inferences. *Hedrick v. Osborne & Co.*, 99 Ind., at page 147; *Union, etc., Ins. Co. v. Buchanan*, 100 Ind. 72; *Terre Haute, etc., R. Co. v. Pierce*, 95 Ind. 496; *Indianapolis, etc., R. Co. v. Collingwood*, 71 Ind. 476; *Indianapolis, etc., R. Co. v. Thomas*, 84 Ind. 195; *Johnson v. Hudson River Co.*, 20 N. Y. 65, 75 Am. Dec. 375; *Schneider v. Market St. R. Co.* (Cal.), 66 Pac. 734; *Dowell v. Guthrie*, 99 Mo. 653, 12 S. W. 900, 17 Am. St. Rep. 598; *Schoepper v. Hancock, etc., Co.* (Mich.), 71 N. W. 1081-1084. The evidence shows that the view on appellant's track of the appellee's wagon, from the approaching car, was clear for a distance of 900 feet. There is no evidence fixing the speed of the car at any given point of the

900 feet. There is evidence that it passed over that distance in about one-half minute, and without warning struck the appellee's wagon. The speed, from this evidence, for at least a part of the way, was, therefore, great. The morning being clear, the view unobstructed, the motorman could fairly be held to have knowledge of the conditions existing at the place of the collision, and to see the appellee's peril in time to have prevented the accident by the exercise of reasonable care. It is the duty of a motorman of a street car to have it under such control that it may be stopped within a short distance if the occasion requires. From his failure to exercise reasonable care without explanation, the jury might properly draw the conclusion of negligence. But counsel for appellant insist that there is no evidence of negligence, and that the facts proven are equally consistent with any one of three theories: (a) That of pure accident, as far as the appellant or any of its employees are concerned; (b) that of negligence on the part of the appellant; (c) that of willfulness on the part of the appellant; and that they point to one theory no more strongly than to the other. The purpose to commit willful injury — the commission of a crime — will not be inferred when the result of tortious conduct may be reasonably attributed to negligence or inattention. Innocence of crime is presumed. The inference of negligence is not equally reasonable with that of inattention. This is a fact of common observation. *Jones v. United States Traction Co.*, 201 Pa. St. 344, 50 Atl. 826; *Elwood, etc., R. Co. v. Ross*, 26 Ind. App. 258, 58 N. E. 535; *Cleveland, etc., R. Co. v. Klee*, 154 Ind. 430, 56 N. E. 234. The jury had a right to put a construction upon the silence of the appellant. The manner of operating the car was known to its employees. If the injury was due to accident, it was susceptible of easy proof. From the failure of such proof the inference of carelessness, rather than accident, might reasonably be drawn.

The presumption of negligence of the railroad company would not arise from the mere fact of the collision, but the jury might reasonably expect (the situation of appellee being apparent) explanation of the failure to stop the car in time to have avoided the collision. *Danner v. South Car., etc., R. Co.*, 55 Am. Dec. 678: "That the company did not produce witnesses to show how the accident

occurred, nor explain why they omitted to do so, tends to induce the belief that they could make no defense. They had the witnesses under their control. The plaintiff may not have been present when his cattle were killed, and may not be able to discover who the persons were employed on the train when the damage was done. When a party is charged with an act or declaration which may subject him to an action, and does not deny it, his silence is construed as an admission. The same construction may be put on a party's omission to offer testimony in his defense when it is in his power to produce the witnesses who might exculpate him." "It may be generally said, however, that the person controlling the motive power of a street car must use the highest degree of care to avoid injury to a person after discovering his peril." *Nellis St. Surface R.* 299, and cases cited. See also 2 *Thomps. Neg.* The inference of the negligence of appellant is the only one which can fairly be drawn from the facts.

Was appellee guilty of negligence proximately contributing to his injury? He was not a trespasser. He was on a street railway track in a public street, with as much right as the railway company. He was upon the right side of the street. Obstructions left in the street by appellant made it dangerous for him to drive north of the south track, and difficult to drive south of the south track or back to the north track after getting on the switch and starting across to the south track. There were two wagons in the way of his driving on the north side. He had no reason to believe that he would have to stop until after he had gotten on the south track. He knew that no car ordinarily ran there at that hour; that it was the custom to stop it at the crossing; that it was the duty of the motorman to give him warning; that he could be seen for 900 feet; that the car could be easily stopped, as the track was slightly up grade for several hundred feet from Harding street to the crossing. He looked three times for an approaching car — once as he went on the track and twice after he had stopped; the last time about one-half minute before the collision. He did not see nor hear the car. If he had known of the approach of the car, it would have been his duty to have attempted to get off the track. He was not required to constantly look behind him. *Wabash R. Co. v. Biddle*, 27 Ind. App. 161,

59 N. E. 284, 60 N. E. 12. The wagon was plainly visible to the motorman, and without special circumstances, which do not appear, the railway company could only have run appellee down carelessly or willfully. He may be presumed to have known this. *Tunison v. Weadock* (Mich.), 89 N. W. 703; *Vincent v. Norton, etc., R. Co.* (Mass.), 61 N. E. 822. Under the most favorable view to be taken for appellant of the evidence, it could only be said that the circumstances were such that reasonable minds might draw different conclusions respecting appellee's fault, and then the question of due care was one of fact for the jury, and the jury have passed upon that question adversely to appellant's claim.

Judgment affirmed.

Indianapolis Street Railway Co. v. Dawson.

(Indiana — Appellate Court, Division No. 2.)

1. DUTY OF STREET RAILWAY COMPANY TO PROTECT PERSONS IN AMUSEMENT PARK MAINTAINED BY IT.—The plaintiff, a colored person, was transported over the street railway of the defendant company to an amusement park maintained and supported by it. Such park had been frequently visited by a large number of lawless persons who were hostile to colored people. The defendant had knowledge of this but did not inform the plaintiff of such fact. While in such park the plaintiff was assaulted and severely injured by such lawless persons. The defendant's employees did nothing to protect the plaintiff. A judgment in favor of the plaintiff was sustained.
2. EVIDENCE OF SIMILAR OCCURRENCES.—Evidence as to prior assaults at the park upon colored persons and articles previously published by daily newspapers describing such occurrences were held competent.

APPEAL by defendant from judgment for plaintiff. Decided November 17, 1903. Reported (Ind App.), 68 N. E. 909.

Winter & Winter and *Will H. Latta*, for appellant.

I. D. Blair and *O. V. Royall*, for appellee.

Opinion by ROBY, J.

Action by appellee. Verdict and judgment for \$500. Demurrers to first and second paragraphs of complaint overruled. Motion for a new trial overruled.

It is averred in the first paragraph of complaint, in substance, as extracted from a multitude of words: That appellant was, on August 25, 1901, a corporation operating a street railway system in Indianapolis and was a common carrier for hire. That it owned a park near said city, and maintained certain attractions thereon to induce persons to ride on its cars inviting them to said park. On the day named it gave a free band concert therein, the same having been extensively advertised prior thereto. That on said day appellee, accompanied by a lady, took passage upon one of its regular cars, and was conveyed to said park. That a large number of persons were daily transported thereto, among them a large number of lawless persons who were hostile to colored people, of whom appellee was one, their names being unknown to plaintiff, and who had long before said day entered into a conspiracy "to suppress, molest, assault, and insult colored people generally who might visit said park." That in pursuance of such conspiracy said persons assaulted and beat appellee, and drove him from the park; that he and his companion demeaned themselves in a ladylike and gentlemanly manner, but upon arriving at the park were set upon by a large number of white boys and young men, appellee being assaulted and beaten by them; that appellant had, and had had for a long time prior to said day, full notice and knowledge of said conditions, and of the unlawful purposes aforesaid, and of acts of violence committed thereunder, but took no steps to prevent such conduct; that early in the afternoon of said day said lawless men and boys began marching and drilling openly in said park preparatory to an attack upon any colored male person who should be found there later, appellant taking no steps to prevent such conduct or to notify colored people of the danger, although it had knowledge thereof; that neither appellant nor its officers made any objection to the open and notorious gathering of white men and boys for the unlawful purpose stated. That it was negligent and indifferent in not employing and using a sufficient number of guards and policemen to maintain the peace. That two of its guards or policemen aided and abetted the wrong done appellee by standing by while he was being unmercifully beaten by said crowd of lawless white men and boys, and offering him no assistance, although they were able

to do so, and could have prevented injury to him. "Wherefore, by reason of the matters therein stated, the plaintiff has been damaged," etc. The second paragraph of complaint is somewhat more extended than the first one, but for the purpose of this opinion the statement made is sufficient.

The pleading charges appellant with notice of the alleged conspiracy, with acquiescence therein, and, by its guards or policemen, with passive participation in the actual assault made upon appellee.

"When one expressly or by implication invites others to come upon his premises, whether for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the place reasonably safe for the visit." *Cooley Torts* (2d ed.), 718; *Howe v. Ohmart*, 7 Ind. App. 33, 38, 33 N. E. 466; *Richmond v. Moore's Admr. (Va.)*, 27 S. E. 70, 37 L. R. A. 258; *North Manchester v. Wilcox*, 4 Ind. App. 141, 30 N. E. 202; *Penso v. McCormick*, 125 Ind. 116, 25 N. E. 156, 9 L. R. A. 313, 21 Am. St. Rep. 211.

No case has been cited or found where the premises upon which the injury complained of occurred, and to which the complainant came by invitation, were made unsafe through a conspiracy of the nature set up herein. Danger usually has been attributed to some defect in the premises themselves. But as a matter of principle it is quite as reprehensible to invite one knowing that an enemy is awaiting him with intent to assault and beat him as it would be to invite him without having made the floor or the stairway secure. One attending an agricultural fair in response to a general invitation extended to the public has been awarded damages against the association where his horse was killed by target shooting upon a part of the ground allowed for such purpose. *Conrad v. Clauve*, 93 Ind. 476, 47 Am. Rep. 388. Judgments have also been sustained: When spectators rushed upon a race track, causing a collision between horses being driven thereon. *North Manchester, etc. v. Wilcox*, 4 Ind. App. 141, 30 N. E. 202. When an opening was left in a fence surrounding a race track, through which one of the horses running went among the spectators. *Windeler v. Rush County Assn.*, 27 Ind. App. 92, 59 N. E. 209, 60 N. E. 954. Where horses were started on a race

track in opposite directions at the same time, causing collision. *Fairmount v. Downey*, 146 Ind. 503, 45 N. E. 696. Where a horse with a vicious habit of track bolting was permitted to run in a race, such horse bolting the track, causing injury. *Lane v. Minnesota State Agri. Soc.* (Minn.), 64 N. W. 382, 29 L. R. A. 708. Recognizing the rule of reasonable care to make the premises safe, a recovery was denied in the absence of any evidence of the immediate cause of a horse running through the crowd. *Hart v. Washington Park Club*, 157 Ill. 9, 41 N. E. 620, 29 L. R. A. 492, 48 Am. St. Rep. 298. Where a street-car company maintained a park as a place of attraction for passengers over its line, and the falling of a pole used by one making a balloon ascension under a contract injured a bystander, recovery was allowed, the rule being announced that the company must use proper care to protect its patrons from danger while on its grounds. *Richmond Ry. Co. v. Moore's Admr.* (Va.), 27 S. E. 70, 37 L. R. A. 258. Where a street-car company maintained a large stage for exhibitions, in a pleasure resort owned by it, and made a written contract with a manager, by which the latter furnished various entertainments, among which was target shooting, one injured by a split bullet was allowed to recover, it being held that he might safely rely on those who provided the exhibition and invited his attendance to take due care to make the place safe from such injury as he received, the question of due care being one for the jury. *Thompson v. Lowell*, 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323; *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421. The duty of common carriers to protect their passengers from injury on account of unlawful violence by persons not connected with their service has frequently furnished material for judicial consideration. The New Jersey Court of Errors and Appeals approved of an exhaustive and carefully considered opinion delivered by the Supreme Court of that State to the effect that a passenger who, while attempting to have her baggage checked, was knocked down and injured by cabmen, in no sense servants of the carrier, scuffling on a passageway under its control, might recover against it. *Exton v. Railroad Co.*, 63 N. J. L. 356, 46 Atl. 1099, 56 L. R. A. 508. In what seems to have been a pioneer case, it was held by the Su-

preme Court of Pennsylvania in 1866 that it was the duty of the trainmen on a passenger train to exert the forces at their disposal to prevent injury to passengers by others fighting in the car. *Pittsburgh v. Hinds*, 53 Pa. St. 512, 91 Am. Dec. 224. Ten years later the Supreme Court of Mississippi, after very exhaustive arguments by eminent counsel of national reputation, reached the same conclusion. *N. O., etc., Ry. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689. Without further elaboration, it may safely be said that the unusual character of an alleged peril, from which it is averred the appellant did not use due care to protect its visitors, does not affect the right of recovery, it being otherwise justified. The demurrers were, therefore, correctly overruled.

Evidence was introduced of other prior assaults at said park upon colored persons, and articles previously published by daily newspapers in the city describing such occurrences were also admitted. In order to determine whether appellant used due care, it was essential to show its knowledge or means of information relative to the conditions alleged to exist rendering it dangerous for appellee to visit the park. The evidence of similar occurrences was competent as tending to show notice of the conditions. *Toledo, etc. v. Milligan*, 2 Ind. App. 278, 28 N. E. 1019; *Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98; *Goshen v. England*, 119 Ind. 368, 375, 21 N. E. 977, 5 L. R. A. 253. The facts upon which appellant's liability depends otherwise than heretofore considered were questions for the determination of the jury. There was evidence tending to establish, and from which the jury might properly find, the existence of such facts. Appellant and its officers appear to have displayed indifference to the conditions existing which it and they could not well help knowing. This may have been due to the idea, sometimes entertained, that as to acts of lawlessness it is a sufficient duty of citizenship to be indifferent. Such idea is entirely erroneous.

Judgment affirmed.

Indianapolis Street Railway Co. v. Brown.

(Indiana — Appellate Court, Division No. 2.)

INJURY TO PASSENGER ALIGHTING FROM MOVING CAR;¹ **INSTRUCTIONS TO JURY.**—The plaintiff, a passenger on one of the defendant's street cars, was injured by the sudden starting of the car while in the act of alighting; it appeared that she did not wait for the car to stop before stepping off. An instruction to the effect that if the car was so nearly stopped that an ordinarily prudent person would have deemed it safe to alight therefrom, and while attempting to alight the plaintiff was thrown to the ground by the motorman in charge of the car suddenly starting it before she had alighted, she would be entitled to recover damages for the injury, is not erroneous. Other instructions pertaining to the liability of street railway companies for injuries occasioned to alighting passengers considered and sustained.

APPEAL by defendant from judgment for plaintiff. Decided January 6, 1904.
Reported (Ind. App.), 69 N. E. 407.

Winter & Winter, Marsh & Cook, and W. H. Latta, for appellant.

Wymond J. Beckett, for appellee.

Opinion by ROBY, J.

Action for damages on account of personal injuries averred to have been negligently caused by appellant. Appellee was a passenger upon one of appellant's street cars within the city of Indi-

The following cases, reported in this series, relate to passengers injured while attempting to alight by the sudden start of a car: *Mead v. Boston Elev. Ry. Co.*, 2 St. Ry. Rep. 456, (Mass.) 70 N. E. 197; *Hastings v. Boland*, 2 St. Ry. Rep. 503, (Mich.) 98 N. W. 1017; *Scamel v. St. Louis Transit Co.*, 2 St. Ry. Rep. 626, (Mo. App.) 77 S. W. 1021; *Peck v. St. Louis Transit Co.*, 2 St. Ry. Rep. 508, (Mo. Sup.) 77 S. W. 736; *Hannon v. St. Louis Transit Co.*, 2 St. Ry. Rep. 624, (Mo. App.) 77 S. W. 158; *Dawson v. St. Louis Transit Co.*, 2 St. Ry. Rep. 625, (Mo. App.) 76 S. W. 689; *Brazie v. St. Louis Transit Co.*, 2 St. Ry. Rep. 624, (Mo. App.) 76 S. W. 708; *Duffy v. St. Louis Transit Co.*, 2 St. Ry. Rep. 626 (Mo. App.) 78 S. W. 831; *Paganini v. North Jersey St. Ry. Co.*, 2 St. Ry. Rep. 731, (N. J. L.) 57 Atl. 128; *San Antonio Traction Co. v. Welter*, 2 St. Ry.

anapolis, and while attempting to leave the car was thrown or fell to the pavement. Her theory, supported by the testimony of several witnesses, was that she signaled for the car to stop, that it did stop, and that she was in the act of stepping off when it suddenly started ahead, throwing her. Appellant's theory, supported by the testimony of several witnesses, was that she did not wait for the car to stop, but stepped off while it was in motion, and was thereby thrown. That she was injured is not disputed. As to the extent of her injury there was conflicting testimony. Verdict for appellee assessing damages at \$1,200, with answers to interrogatories. Motion for new trial overruled. Judgment on verdict.

The only questions argued relate to the giving of certain instructions and the refusal to give others requested. Appellant asked that the jury be instructed that, if the accident did not happen as alleged in the complaint — *i. e.*, by appellee starting to alight from a car that was standing still, but from one that was in motion — there could be no recovery. The answers to interrogatories show that the car was not moving. Error, if any, in refusing the instruction requested, was not, therefore, harmful. *Roush v. Roush*, 154 Ind. 562, 55 N. E. 1017.

The seventeenth instruction given was as follows: "If, however, the car was stopped to let the plaintiff alight therefrom, or so near stopped that an ordinarily prudent person using ordinary care to avoid accident would have deemed it safe to alight therefrom, and under such circumstances the plaintiff, using ordinary care to avoid any injury, attempted to get off the car, and while

Rep. 900, (Tex. Civ. App.) 77 S. W. 414; *Richmond Traction Co. v. Williams*, 2 St. Ry. Rep. 927, (Va.) 46 S. E. 292; *Champagne v. La Crosse City Ry. Co.*, 2 St. Ry. Rep. 988, and note, (Wis.) 99 N. W. 334; *Boone v. Oakland, Transit Co.*, 1 St. Ry. Rep. 14, (Cal.) 73 Pac. 243; *Denver Consol. Tramway Co. v. Rush*, 1 St. Ry. Rep. 30, (Colo.) 73 Pac. 664; *Henning v. Louisville Ry. Co.*, 1 St. Ry. Rep. 238, 24 Ky. Law Rep. 2419, 74 S. W. 209; *United Ry. & Elec. Co. v. Woodridge*, 1 St. Ry. Rep. 281, (Md.) 55 Atl. 444; *Lee v. Elizabeth, etc., Ry. Co.*, 1 St. Ry. Rep. 539, (N. J.) 55 Atl. 106; *Memphis St. Ry. Co. v. Shaw*, 1 St. Ry. Rep. 771 (note on page 773), (Tenn.) 75 S. W. 713; *Fuller v. Dennison & Sherman St. Ry. Co.*, 1 St. Ry. Rep. 780 (and note), (Tex. Civ. App.) 74 S. W. 940.

so doing was thrown to the ground and injured, by the motorman in charge of said car suddenly starting the same before she had alighted, then, and in such event, if shown by the evidence, the plaintiff would be entitled to recover damages for the injury, if any, received." The clause of the instruction as to appellee alighting before the car stopped is, in any view, rendered harmless by the interrogatory above referred to. The question of due care on the plaintiff's part is expressly left to the jury, as should have been done. The plaintiff's right to recover is stated, if the facts are found to be that the car was stopped to let her alight, and that she, while attempting to do so, using ordinary care, was thrown and injured by the motorman suddenly starting the car before she had alighted. Had it been stated in the instruction that the plaintiff was entitled to recover, if, in view of all the facts, the motorman "negligently" started the car, it would have been unobjectionable. It is argued with force that, in the absence of such word, the instruction took the question of fact from the jury, and declared the defendant's negligence, without taking into account the circumstances other than those detailed. To suddenly start a street car while a passenger is in the act of alighting therefrom is held to be negligence. *Railroad Co. v. Merl*, 26 Ind. App. 284, 59 N. E. 491; *Railroad Co. v. Huffer*, 26 Ind. App. 575, 60 N. E. 316. The car having been stopped for the purpose of enabling appellee to alight, appellant was bound to know that she had done so before starting the car again; and suddenly starting it while she was in the act of alighting was an act of negligence. *Anderson v. Railway Co.*, 12 Ind. App. 194, 38 N. E. 1109; *Washington v. Tobriner*, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284. No circumstance is suggested, and none occurs, which, as between the carrier and its passenger, would make such act anything but negligence. The instruction is not a model, but there was no error in giving it.

The eighteenth instruction given was as follows: "While a common carrier of passengers is not an insurer of their safety, still, in consideration of the great danger to human life consequent upon the neglect of duty upon the part of the carrier, the law exacts of it the exercise of the highest practicable care for

the safety of its passengers in the operation of its cars, and stopping and starting its cars to enable passengers to get on and off the same, and for any failure to exercise such care, and for slight neglect of its duty in this respect resulting in an accident or injury it is liable to a passenger who is herself without fault, for an injury sustained as the proximate result of such negligence." The law, as stated, has been declared to be "well settled." *Railroad Co. v. Hoffbauer*, 23 Ind. App. 614-620, 56 N. E. 54.

The twenty-ninth instruction related to the answering of interrogatories submitted, and was in part as follows: "If the burden is upon either party to show any particular fact called for in any question, such fact should be established by a fair preponderance of the evidence to warrant you in so answering the question as to show the fact established. If there is no preponderance of evidence on any question — that is to say, if the evidence tending to prove the fact in question is only balanced by the evidence to the contrary — then such fact would not be proven, and your answer should be in the negative." It is argued that the instruction is bad on the authority of *Railway Co. v. Reed*, 151 Ind. 396, 51 N. E. 477. The language of the instruction condemned in that case is practically the same as that of the last clause above quoted. The difference is that in the *Reed* case the burden was upon the plaintiff to establish both the defendant's negligence and resulting damage and her own freedom from contributory negligence, and an instruction, therefore, which put the burden upon the defendant as to any portion of the issue was erroneous, while in the case at bar the burden is upon the defendant as to the question of contributory negligence. The instruction given discriminates between questions upon which the appellant had the burden and those upon which appellee had it, and, therefore, accords with the holding in the case cited.

The substance of the instructions refused, in so far as they contained correct statements of the law, was fully covered by other instructions given by the court.

Judgment affirmed.

Other Cases Decided in Appellate Courts of Indiana.

1. **COLLISION WITH VEHICLE ATTEMPTING TO CROSS TRACK; DUTY OF MOTORMAN; CONTRIBUTORY NEGLIGENCE.**—In the case of *Moran v. Leslie* (Ind. App.), 70 N. E. 162, the plaintiff recovered judgment for \$2,400 for damages sustained by reason of a collision of one of the defendant's street cars with a wagon which the plaintiff was attempting to drive across the defendant's track. It appeared that the plaintiff was the driver of a covered mail wagon with a wire netting back of the seat. After having loaded the wagon with the mail at a railway station he drove from the passageway of the station into the street in which the defendant's tracks were laid, when he saw a street car approaching from the south at a distance of not more than thirty feet. The head of the horse was over the first rail of the tracks upon which the car was approaching, and instead of stopping the horse to allow the car to pass he hit the horse with the lines and drove across the track, the rear wheel being struck by the car, and he being thrown from the wagon. It was held that it was the duty of the motorman when running his car along a crowded street to have it under such control as to be able to stop or check it to avoid collision, and also to keep a vigilant lookout to the same end. But it was also held that the plaintiff was guilty of contributory negligence in attempting to cross the track when he knew that if he did so the car was likely to strike him. The judgment for the plaintiff was reversed.
2. **COLLISION WITH VEHICLE DRAWN BY UNMANAGEABLE HORSE ALONG THE TRACK; DUTY OF MOTORMAN TO AVOID INJURY; CONTRIBUTORY NEGLIGENCE.**—In the case of *Hammond, Whiting & East Chicago Electric St. Ry. Co. v. Eades* (Ind. App.), 69 N. E. 555, it appeared that the plaintiff's horse and wagon was hitched at the side of the street, and when the plaintiff unhitched the horse, and stepped into the wagon, and before he had reached or could reach the lines the horse started with the wagon and the plaintiff along the side of the defendant's track. The horse was unmanageable and was drawing the wagon along and near the track, swerving from one side to the other. When the horse was unhitched the car causing the injury complained of was 200 feet or more distant. The motorman of the car which struck the plaintiff's wagon had full knowledge that the horse was unmanageable. It was held that the plaintiff could not be charged with negligence, under the circumstances shown by the evidence, after the horse had become unmanageable; that the case was fully within the rule that where one person sees another in a position of peril from which he is unable to extricate himself by the exercise of reasonable care, it is the duty of such person to so act as not to increase the peril, and if he does so act in a manner which increases the danger, with full knowledge of the facts, he will not be relieved from the damages which might result from such negligent acts. In discussing this question the court said:

"In the case at bar the evidence fairly shows that there was ample time, after the motorman saw the impending danger in which appellee was placed, to have stopped the car and to have avoided the injury. The evidence does not show, as counsel for appellant contend, that the horse drawing appellee's wagon was trotting along the street at a safe distance from the track, and that there was no indication that the horse was frightened, and that the vehicle would, by the action of the horse, be suddenly drawn upon the track. In *Muncie St. Ry. Co. v. Maynard*, 5 Ind. App. 372, 32 N. E. 343, the law applicable to a state of facts such as was proven in this case was stated by this court in the following language: 'We think the evidence shows that the engineer could have seen the helpless condition of the appellee in time to have stopped his train and have avoided the injury. It was his duty to be constantly on the alert, and, if he discovered appellee's property so situated that injury must follow unless he stopped his engine, it was his duty to make all reasonable effort to do so. Those in charge of an engine upon a street-car track are not required or under obligation to immediately stop an engine upon seeing a horse or team by the side of the track that is manifesting fright, unless the situation and all the circumstances would cause a reasonable man to see and believe that damage to the property could not otherwise be avoided.' In the case of *Terre Haute Electric Ry. Co. v. Yant*, 21 Ind. App. 486, 51 N. E. 732, 69 Am. St. Rep. 376, this court adopted and approved the doctrine of the Supreme Court of North Carolina in *Doster v. Charlotte St. Ry. Co.*, 117 N. C. 651, 23 S. E. 449, 34 L. R. A. 481; that court saying: 'Where a horse is being driven or is running uncontrolled along a highway parallel to a railway of any kind, though it give unmistakable evidence by its movements that it is alarmed at an approaching train or car, the engineer or motorman in charge is not negligent in failing to diminish the speed, unless the animal is actually on the track in his front, or he has reasonable ground to believe that, in its excited state, it is about to go or may go upon it, so as to cause a collision.' We believe that the jury in this case had a right to conclude, from all the facts, that the motorman in charge of the car, and having in plain view the unmanageable horse, must have had, as a reasonably prudent man, reasonable grounds to believe that the horse, in its unmanageable condition, swerving on and off of the track, was about to or might go upon the track and cause a collision. The rule as stated by Booth on St. Ry. Law, at § 298, and which is applicable to the facts produced in this case, has been adopted as a law in this State. It is stated as follows: 'And * * * for obvious reason, companies which have been duly licensed, and therefore have as much right to run their cars in the streets as others have to drive through them with their horses and vehicles, cannot ordinarily be held responsible for horses taking fright at the appearance, movement, or noise of the cars. If a horse takes fright at an approaching car, and, because the car is not stopped, * * *

becomes unmanageable and runs away, injuring the driver or others, the company is not liable, unless the conduct complained of, in the management of the car, is attributable only to a wanton or malicious disregard for the safety of the driver or other travelers upon the street. * * *

To the extent that travelers, whether in cars, on foot, or in private vehicles, have the right to proceed without unnecessary interruption or delay, the rights of all are equal, and the law makes no distinction between the vehicles used or the means employed. No other rule would be reasonable or practicable, for, if drivers, motormen, or gripmen were required to stop their cars, slacken their speed, or omit or discontinue necessary signals, upon which the safety of others depends, because timid horses become frightened, or already manifest symptoms of fear, not indicating imminent peril, street railway service would be so materially embarrassed by numerous delays as to defeat the purpose for which such franchises are granted, and the dangers to the general public, for whose protection warnings are given, would be greatly enhanced.' The facts in this case, we think, justified the jury in concluding that appellee was in imminent peril, and that the motorman in charge of the car must have known of appellee's peril."

3. DRIVING VEHICLE ON TRACK IN FRONT OF APPROACHING CAR WITHOUT LOOKING; CONTRIBUTORY NEGLIGENCE.—In the case of Indianapolis Street Ry. Co. v. Marschke (Ind. App.), 70 N. E. 494, it appeared that the appellee was driving a buggy along a street in which the appellant's tracks were laid. In attempting to pass by another vehicle she turned to the left and drove so near the appellant's tracks that there was no room for the car to pass without striking her buggy. There was nothing to prevent her from seeing the approaching car for a distance of 500 or 600 feet had she looked. The motorman of the approaching car knew or had reason to know that the appellee would turn toward the track in order to get around the vehicle in front of her; but from the evidence it appeared that he could not have stopped the car in time to have prevented the accident after the appellee began to turn toward the track. The rate of speed at which the car was running did not exceed twenty miles an hour. The jury rendered a verdict in favor of the plaintiff. Upon appeal the appellant insisted that the evidence affirmatively showed that the appellee was guilty of negligence in turning her buggy onto the track without looking for the approaching car. In discussing this question the court said:

"The question of appellee's negligence must be determined in view of the rule, so firmly established in this State, that the law will presume that she actually saw what she could have seen, if she had looked, and heard what she could have heard, if she had listened. *Young v. Citizens'*, etc., Ry. Co., 148 Ind. 54, 44 N. E. 927, 47 N. E. 142; *Cones v. Cincinnati*, etc., Ry. Co., 114 Ind., at page 114, 16 N. E. 638; *Lake Erie*, etc., Ry. Co. v. *Stick*, 143 Ind. 449, 41 N. E. 365. If she could have seen the approaching car, by looking, in

time to have escaped colliding with it, it will be presumed, in case of collision, either that she did not look, or, if she did, she did not heed what she saw. Such conduct is held to be negligence *per se*. Ohio, etc., Ry. Co. v. Hill, 117 Ind., at page 61, 18 N. E. 461; Cones v. Cincinnati, etc., Ry. Co., 114 Ind., at page 330, 16 N. E. 638; Lake Erie, etc., Ry. Co. v. Stick, *supra*; Young v. Citizens', etc., Ry. Co., *supra*. If it was negligence for her to drive on the track so an approaching car would strike her, without first looking, then she could not recover, for by her own act she contributed to her injury. In Young v. Citizens', etc., Ry. Co., 148 Ind. 54, 44 N. E. 927, 47 N. E. 142, such conduct was declared to be negligence. The case of Kessler v. Citizens' Street Ry. Co., 20 Ind. App. 427, 50 N. E. 891, decides the identical question we are now considering, with this exception: In that case appellee was driving on a street where appellant operated a line of street cars, and was driving at a safe distance from the track so a car could pass. To get around a wagon in front, appellee turned on the track about forty feet in front of a car going in the same direction. The motorman did not have any warning that appellee was going to turn onto the track, and could not have stopped the car in time to avoid a collision after he discovered the danger. Upon these facts it was held that appellant could not recover. Here the jury found that the wagon in front of appellee was an indication to the motorman that appellee intended to turn to pass it, and that he knew, or had reason to know, she would turn toward the track. We think this finding is largely speculative, and more the statement of a conclusion than a substantive fact. The finding casts upon the motorman the presumption that she would deliberately imperil her life and safety by driving on the track, when he had a right to presume that she would not do so.

"If it was negligence for appellant to run its car at the rate of speed it did, it was likewise negligence for appellee to drive upon the track in front of it, when she had ample opportunity of seeing its approach, if she had looked, and could thus have avoided injury. The law is too well settled to be longer in doubt that a person must exercise his own faculties so as to avoid danger, if he can reasonably avoid it; and a failure to do so, if it contributes proximately to the injury, will prevent the one thus injured from recovering damages therefor. Salem-Bedford Stone Co. v. O'Brien, 12 Ind. App. 217, 40 N. E. 430. If appellee had looked, she could have seen the approaching car, and realized her impending danger, and thus avoided injury. This she did not do, but deliberately placed herself in a place of peril, without taking any precaution for her safety. The two essential elements of contributory negligence are want of ordinary care by the plaintiff and a casual connection between such want of care and the injury. Salem-Bedford Stone Co. v. O'Brien, *supra*. Here these two elements combine, for appellee did not use ordinary care, and there was a direct and casual connection between such want of care and the injury.

"It is unnecessary to discuss the relative rights of a street-car company and a traveler to the use of the street occupied by street-car tracks. The simple question here involved is this: Can a person, traveling upon a street, deliberately drive or walk in front of an approaching car, without looking or taking any precautions to avoid a collision, and recover for resulting injury? This question must be answered in the negative, for the authorities so hold. The cases cited are in point. In the recent case of Indianapolis Street Ry. Co. v. Tenner, 67 N. E. 1044, this court held that a party who had alighted from a street car and passed back of it, and upon the track on which cars traveled in the opposite direction, without looking or listening for the approach of cars, was guilty of contributory negligence, and could not recover. The facts in that case made a more favorable showing for appellee than they do here, for there the view of the approaching car was obstructed by the car from which she alighted, and she could not see the approaching car until she had passed behind the one upon which she had been riding. Here appellee could have seen the car that injured her, if she had looked, at any time after it came over the top of the viaduct, and when it was 400 or 500 feet away, and continuously to the time it struck her. The facts specially found are in irreconcilable conflict with the general verdict, in that they show appellee was guilty of contributory negligence."

Cook v. Boone Suburban Electric Railway Co.

(Iowa — Supreme Court.)

EMINENT DOMAIN; ASSESSMENT OF DAMAGES.—Where an electric railway company seeks to acquire by condemnation a right of way across farm lands, the owner is entitled to an assessment of such damages as are occasioned to the entire farm by the taking of the right of way. The fact that the company in describing the lands over which it desires to construct its road includes only a portion of the farm does not affect this right. Nor does the fact that a steam railroad is built from east to west across the farm, where the land on both sides of such railroad is used for farm purposes, affect the owner's right to have the entire tract treated as one farm.

1. As to right of eminent domain as applied to street railway companies see note to *Boyd v. Logansport R. & N. T. Co.*, *ante*, p. 193. For other cases in this volume relating to the right of eminent domain, see *South Buffalo Ry. Co. v. Kirkover*, 2 St. Ry. Rep. 733, 176 N. Y. 301, 68 N. E. 366.

APPEAL by defendant from an assessment of damages in proceedings to condemn a right of way. Decided January 27, 1904. Reported 122 Iowa, 437, 98 N. W. 293.

S. R. Dyer and W. W. Goodykoontz, for appellant.

John A. Hull, for appellee.

Opinion by WEAVER, J.

The evidence tends to show that plaintiff is the owner of a farm described as the east half of the northeast quarter and the east half of the southeast quarter of section 26, township 84, range 27, in Boone county, Iowa. For some years prior to the institution of these proceedings a right of way crossing this land near the south line of the north forty-acre tract of land had been owned and occupied by the Northwestern Railway Company. The appellant company's right of way enters this north forty at the northeast corner, running southwesterly to the Northwestern's right of way; thence parallel to the latter to the western line of plaintiff's land. In instituting its condemnation proceedings the appellant company did not describe the entire farm, but only that part lying north of the Northwestern right of way. The sheriff's jury, in its award of damages, described that forty-acre tract alone. Upon the trial of the appeal it was shown, without objection and without dispute, that while the Northwestern railway, in one sense, divided the farm into separate tracts, both were in fact used as one farm; the northern tract being utilized as a pasture in connection with the occupancy and use of the entire premises.

In submitting the case to the jury, the trial court charged that plaintiff's right of recovery was not restricted to the single forty-acre crossed by the railway, but she was entitled to have assessed all such damages as the taking of the right of way occasioned to the farm as an entirety. It is now said — and this is the only point urged in this court — that the question whether the north forty was in fact a part of the farm, or was a separate and distinct tract, should have been submitted to the jury, with the instruction that, if the forty-acre tract was in fact separate and distinct from the principal farm, then the damages to this particular tract alone could be assessed. We find no evidence upon

which such an instruction would have been justified. Certainly the fact that appellant saw fit, in its condemnation proceedings, to describe only the single forty-acre tract upon which the railway was located, can have no effect to deprive plaintiff, upon her appeal, of her right to establish and recover damages to her entire farm, if in fact that forty acres was a part of it. There is no attempt disclosed by the record to show that plaintiff's claim in this respect is not absolutely correct, save as it is sought to be inferred or argued from the fact that the Northwestern railway's right of way and track crossing the premises, as already described, make the pasture of somewhat less convenient use to the farm than it could otherwise be. This fact was to be considered by the jury for what it was worth in arriving at the value of the farm immediately before the appellant appropriated its own right of way, but makes the two parcels of land none the less a single farm. The contiguity of two adjoining forty-acre tracts of land, constituting a single farm, is not destroyed by the location of a railroad running along the boundary line between them, so long, at least, as they continue to be occupied and used as one holding. Had the jury in the present case found that the north tract was separate and distinct from the main farm, it would have been the duty of the court, upon application of the plaintiff, to set aside the verdict because unsupported by the evidence.

The judgment of the District Court is affirmed.

Thurston v. Huston et al.

(Iowa — Supreme Court.)

1. **ADOPTION OF RESOLUTION BY CITY COUNCIL FOR EXTENSION OF FRANCHISE; NECESSARY VOTE.**— A resolution extending the franchise of a street railway company, passed by a majority of a quorum of the members of a city council, is duly adopted in the absence of statutory or charter restrictions.
2. **EXTENSION OF FRANCHISE NOT A NEW FRANCHISE;¹ NOTICE NOT REQUIRED.**— Where a street railway franchise is granted giving the company the

1. **Extension of franchise.**— In respect to the right of a street railway company to construct connecting lines under franchises already obtained, see *Houghton County St. Ry. Co. v. Common Council*, 2 St. Ry. Rep. 487 (Mich.),

power to maintain and operate its tracks upon such streets and highways in the city as may be designated by the company in its written acceptance of the franchise, "and open such other streets and public places as said council may from time to time by resolution designate," the designation of new streets for the use of the company is not the grant of a new franchise, and does not, therefore, require the giving of notice as provided in sections 955 and 956 of the Code.

3. **EXTENSION OF EXCLUSIVE FRANCHISE.**—The designation of additional streets in which the company may lay its tracks does not operate as an extension of the period during which the rights of the railroad company under the original franchise was made exclusive.

APPEAL by defendants from an order denying motion for a dissolution of an injunction. Decided February 17, 1904. Reported 123 Iowa, 157, 98 N. W. 637.

Chas. A. Clark & Son and Wm. G. Clark, for appellant, Cedar Rapids & M. C. Ry. Co.; *John N. Hughes*, for appellants, Chas. D. Huston and Geo. L. Mentzer.

Smith & Smith and Crissman, Trewin & Holbrook, for appellee.

Opinion by **WEAVER, J.**

The defendant, Cedar Rapids & Marion City Railway Company, as assignee of the Thomson-Houston Electric Company operates a street railway system in Cedar Rapids under a

98 N. W. 393. As to the certificate of public convenience required under the New York Railroad Law for the extension of the lines of a street railway company, see *N. Y. C. & H. R. R. Co. v. Auburn, etc.*, R. Co., 2 St. Ry. Rep. 762, 178 N. Y. 75, 70 N. E. 117.

Resolution of city council granting franchise.—In the case of *City of Benwood v. Wheeling Ry. Co.*, 1 St. Ry. Rep. 808, (W. Va.) 44 S. E. 271, the proceedings of a common council in making up a quorum were considered and declared illegal.

An ordinance, duly adopted by the common council of a city under a power conferred by statute, granting to a street railway company certain rights and franchises in city streets, has the force and effect of a statute, and is not subject to revision by the courts on the mere ground of inexpediency or impropriety. *Lange v. La Crosse & E. Ry. Co.*, 1 St. Ry. Rep. 834, (Wis.) 95 N. W. 952.

The ordinary powers of a municipal corporation do not confer the right to permit a street railway company to locate tracks in the streets of the munic-

privilege of franchise granted by an ordinance of said city. That part of the ordinance having reference to the streets to be occupied by the railway tracks, and particularly applicable to the present controversy, provides that the company "may enter upon and construct, maintain, and operate a single or double-track railway, with the necessary turnouts and switches, upon such streets and highways in said city as may be hereafter designated by the said Thomson-Houston Electric Company, in the written acceptance of this ordinance, to be given as hereinafter provided, and upon such other streets and public places as said council may from time to time by resolution designate." In accepting the terms of the ordinance, the railway company designated several different streets, not including Third avenue, hereinafter mentioned. A short time before the commencement of this suit, and

ipality. It must have authority, express or implied, from the Legislature to grant such franchise. *Eichels v. Evansville St. Ry. Co.*, 78 Ind. 261, 41 Am. Rep. 561; *N. Y. & H. R. Co. v. City of New York*, 1 Hilt. (N. Y.) 562; *People's Pass. R. Co. v. City of Memphis (Tenn.)*, 16 S. W. 973. The usual powers conferred upon a city by its charter over city streets are sufficient to authorize the city to permit their use for street railways. *State ex rel. Kansas City v. Corrigan Cons. St. Ry. Co.*, 85 Mo. 263, 55 Am. Rep. 361.

Under a general power granted to a city to permit, allow, and regulate the laying down of tracks for street cars upon such terms and conditions as the city may prescribe, it is not empowered to grant for a term of years an exclusive franchise to occupy its streets with street railroads. *Parkhurst v. Capital City R. Co.*, 23 Oreg. 471, 32 Pac. 304.

Consent of local authorities.—It is usually provided either by the Constitution or the statutes of a State that street railroads shall not be constructed in a street or highway without the consent of the local authorities having control and supervision thereof. These constitutional and statutory provisions vary to a certain extent in the several States. There must be a substantial compliance with such provisions. The consent of municipal authorities granted under such provision usually takes the form of a resolution or ordinance adopted by the legislative body representing the municipality. A failure to advertise or to give sufficient notice of the time and place when the application for the consent of the municipal authorities will be presented, as required by statute, is fatal to the right of the authorities to entertain the application for a franchise. *People ex rel. St. Nicholas Ave., etc., R. Co. v. Grant*, 21 N. Y. Supp. 232. If the municipal charter requires the approval of ordinances by the mayor, an ordinance for the construction of a street railway in city streets must be presented to him for his approval. *Eisenhuth v. Ackerson*, 105 Cal. 87, 38 Pac. 530. And where

several years after the installment of its system, the railway company applied to the city council for leave to extend one of its lines along and upon Third avenue, and a resolution was passed or attempted to be passed by said council granting the request upon certain conditions. The plaintiff, a resident property-owner on said street, then instituted this suit to prevent the signing of said resolution by the mayor and recorder, to declare the same void, and to enjoin the use of said street by the railway company. The petition alleges, as grounds for the relief demanded, that no franchise has ever been granted to operate a railway on Third avenue; that the original ordinance was of no force or effect as the grant of a franchise, except, perhaps, to the streets named in the company's acceptance; and that the resolution in controversy was not passed by the necessary vote, as provided by statute. Many other matters

a charter requires legislative action of a city council to be by ordinance or resolution, the consent to the construction of a street railway in city streets must be in the form of an ordinance or resolution. *West Jersey Traction Co. v. Shivers*, 58 N. J. L. 124, 33 Atl. 55; *Thomas v. Inter-County St. Ry. Co.*, 5 Am. Electl. Cas. 175, 167 Pa. St. 120.

Extension of lines.—The right of an existing street railway company to extend its lines into other streets is usually controlled by statute. Under a Massachusetts statute (Stats. 1874, chap. 29, § 11), allowing a board of aldermen to authorize a street railroad corporation "to extend the location of its tracks within the territorial limits of such city or town, whenever it can be done without entering upon or using the tracks of any other street railway corporation," a street railway corporation may be authorized to locate additional tracks, not connected with its existing tracks, except by the tracks of another corporation. *South Boston R. Co. v. Middlesex R. Co.*, 121 Mass. 485.

A prologation of an existing street railway track in any direction, through any street in which the city council declare that the same is beneficial, is an extension of an existing street railroad within the provisions of a statute (Rev. Stats., § 2505), authorizing such extensions. *City of Cincinnati v. Cincinnati St. Ry. Co.*, 31 Wkly. Law Bull. 308. Under such statute municipal authorities cannot authorize the extension of the tracks of a steam railroad company over the streets of a city, the extension to be operated by horse power. *Cincinnati, etc., Ry. Co. v. City of Cincinnati*, 52 Ohio St. 609, 44 N. E. 327. As to the right of an existing street railway company to extend its lines, see *Mayor v. Eighth Ave. R. Co.*, 7 App. Div. (N. Y.) 85; *Mayor v. New York & Harlem R. Co.*, 46 St. Rep. 349, affirmed, 139 N. Y. 643, 35 N. E. 206; *State v. Cincinnati, etc., Ry. Co.*, 19 Ohio Cir. Ct. 79, 10 Ohio C. D. 418.

of more or less immaterial character are pleaded, but not insisted upon in argument. Upon these allegations a temporary injunction was granted as prayed. Answering the petition, defendants admit the passage of the resolution by the city council granting the railway company leave to lay a track on Third avenue, and that plaintiff is the owner of lots fronting on said street, and specifically denies each and every other allegation upon which plaintiff's claim for relief is founded. Further and affirmatively they allege the granting of the street railway franchise originally to the Thomson-Houston Electric Company, its acceptance by said company, the assignment thereof by the Thomson-Houston Electric Company to the defendant, Cedar Rapids & Marion City Railway Company, the action of the city council approving and affirming said assignment on certain conditions, and the acceptance of the said conditions by the defendant railway company. It further alleges that the franchise granted by the original ordinance is general in character, giving to the company the right to lay its tracks on any or all of the streets of said city as the growth of its population and increase of its business might from time to time demand, subject only to the proper supervision and control by the city through its council and mayor, and that, in pursuance of such privilege, the company applied to the city council for leave to lay its tracks upon Third avenue, and that said council, in the exercise of its proper discretion, granted said application. Having thus answered, defendants moved for a dissolution of the injunction, and, the motion being denied, they appeal.

1. The first proposition in the opening argument by the appellee is that the resolution in controversy was not passed by a sufficient vote of the city council. The petition merely alleges, in general terms, "that a majority of the city council did not vote for the passage." The answer alleges that the city council consists of ten aldermen and the mayor, and that, of these members, five aldermen and the mayor — a majority of said number — voted for the resolution. It is said by the appellee that, under the city charter, which provides that the "mayor shall be the presiding officer of the city council and shall give the casting vote when there is a tie," such officer has no right to a vote, save

in a contingency thus provided for, and that without his vote the resolution did not pass by a majority of the entire council. Except for a statement in an affidavit by the mayor that but three members of the council voted against the resolution, there is nothing in the record to negative the existence of the condition authorizing the vote of that officer, but, taking all the several allegations together, it may, perhaps, stand as admitted that, omitting the mayor's vote, the members of the council recorded themselves in favor of the resolution by a vote of five to three. The only question to be considered in this connection is whether a vote of a majority of the entire council is necessary to its passage. No authority is cited by the appellee in support of this contention. In the absence of any statutory or charter restriction, we think the rule is well established that a majority of a quorum is all that is required for the adoption or passage of any resolution or order properly arising for the action of a city council or other collective body exercising legislative, judicial, or administrative functions. *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516; *Attorney-General v. Shepard*, 62 N. H. 383, 13 Am. St. Rep. 576; *Heiskell v. Mayor*, 65 Md. 125, 4 Atl. 116, 57 Am. Rep. 308; *Rushville County v. Rushville*, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. Rep. 388; *Kingsbury v. Centre*, 12 Metc. 99; *State v. Jersey City*, 27 N. J. L. 493; *Launtz v. People*, 113 Ill. 137, 55 Am. Rep. 405. The very fact that the statute makes specific requirement of a majority of all the members for the passage of ordinances, and the adoption of orders and resolutions to enter into contracts or for the appropriation of money, is a clear indication of the legislative intent to leave all matters arising for the action of the council, and not thus enumerated, to be governed by the parliamentary rule generally recognized by the courts, as above indicated. Such, indeed, seems to be the holding already announced by this court in *Strohm v. Iowa City*, 47 Iowa, 42. It follows that the point made by the appellee against the due passage of the resolution cannot be sustained. As the resolution received a majority of the quorum, it becomes unnecessary for us to consider or decide whether, under the special charter of the city of Cedar Rapids, or the general law of the State, the mayor can be regarded as a member of the council.

2. The next reason given why the relief asked should be granted (and the proposition most earnestly pressed in argument) is that the resolution permitting the laying of the street railway track in Third avenue is a new franchise, and cannot be granted without first giving notice as directed in Code, §§ 955, 956. If the premise be correct, and the right to operate a railway in Third avenue is a new franchise, then the conclusion stated by counsel cannot well be avoided. But is it in any proper sense of the word a new franchise, or is the privilege to occupy this street implied and contemplated by the original grant? Without prolonging our opinion to set out the original ordinance in full, we will say that a careful reading of its provisions convinces us that the contract embodied in the grant by the city, and acceptance by the railway company, contemplated a system of street railways for the accommodation of the city generally; that so much of said system as was reasonably required for immediate needs should be constructed without delay; and that extensions of these lines into new neighborhoods, and upon other streets, should be made from time to time in the future as the growth of said city should demand, and the city council designate. This is fairly indicated by the fact that the original grant, after making use of the language quoted by us in the opening statement, proceeds to designate only the general directions in which the initial lines shall be constructed, and fixes the number of miles of track which shall be regarded as the minimum of requirement. The provision that the company shall, in its acceptance of the grant, designate the streets to be occupied by its tracks, has reference only to this minimum of mileage which was exacted as the price or condition of the privilege granted. The future growth and expense of the system was provided for in the clause, "and in such other streets and public places as said council may from time to time by resolution designate." Unless this provision for the future was void for uncertainty, or as being in excess of the power vested in the city, then the resolution permitting the use of Third avenue by the railway company was a lawful exercise of the discretion vested in the city council, and the injunction should have been dissolved. We see no occasion to question the grant on the ground of uncertainty. If the construction of an ordinary railway is contemplated be-

tween two designated terminal stations, the route to be occupied may perhaps be designated with reasonable certainty in its charter, but a street railway system intended for the use and convenience of a growing city for a long period of years presents a different problem. Of necessity, it must be a growth — a development — and the direction or number of the lines or tracks which will be required in the future cannot be foretold with any precision. New streets will be opened, new additions to the city will be laid out, and other changes not now anticipated will take place. To meet these contingencies, the city council, in granting a charter for a comprehensive street railway system, must either in sweeping terms grant the right to occupy all streets now or hereafter opened, or it must adopt some such expedient as was made use of in this case, and provide for the extension of lines from time to time as the need therefor may arise, and the city council direct. These provisions are not for the granting of new privileges or franchises, but for the reasonable regulation and control of the company in the use of the franchise originally granted. To adopt the other plan, and grant a franchise expressly allowing the company to enter upon and occupy any or all streets, without any power of veto or regulation by the city council, even if of any validity, would be a most unwise and impolitic abandonment of an important right. To say that it is not within the power of a city to grant a franchise in general terms, as was here attempted, and that every permission for the extension of the railway into another street or alley is a new franchise, requiring preliminary notice, and possible submission to the popular vote, as upon an original grant, is to hamper the progress and usefulness of a public utility by an unreasonable restriction, and tends to a multiplication of petty franchises, from which a confusion of claims, with resultant burdensome litigation, is sure to arise, to the detriment of public interests. There is nothing, therefore, which is unreasonable or against public policy in holding the city clothed with power to grant a franchise in the terms here employed, nor do we find anything in our statutes which forbids it. If, then, as we conclude, the consent of the council for the extension of the company's track into Third avenue is not the granting of a new franchise, but is simply an exercise of the reserved power to

regulate the company's use of the city streets under the original grant, then the provisions of Code, §§ 955, 956, upon which appellee relies, are not applicable, and that part of his argument based upon said statute requires no further consideration. That statute, by its express terms, is made applicable only to the granting of an original franchise, or to a renewal or extension of the period for which a grant has been made, and not to mere extensions or enlargements of the facilities which the franchise holder employs in exercising the power originally granted. It is to be conceded that a franchise for a street railway may be confined to any one or more streets or neighborhoods of a city, and if the terms of the grant, when fairly construed, indicate that such restricted or localized privilege was intended, then, of course, any extension of such railway into other streets or districts is subject to all the conditions pertaining to the grant of a new or independent franchise. It is a matter of common observation, however, that, outside of the very large cities, street railway franchises confined to a few streets or districts of the municipal territory are very rare; and, while exclusive franchises, except for limited periods, are not allowable, there can be found very few investors disposed to undertake the construction and operation of a street railway system in our small cities, if the right to expand its lines to accommodate the growth and expansion of the city is denied, or if each successive extension of its track into another street involves the procurement of a new and additional franchise. We feel quite certain that the practical construction which has been given the law by the cities of Iowa is in accordance with these views, and that to hold otherwise would result in disastrous confusion.

It is further urged that while, by the terms of the original ordinance, the rights of the railway company were made exclusive for a term of five years only, the construction of the law which we have approved results in giving the company an exclusive privilege for the entire period of twenty-five years. This does not follow — certainly not as a legal necessity. It may be that in a small city the company first in possession of a general franchise, and with a system already inaugurated, holds such a position of vantage that under all ordinary circumstances no competi-

tor will care to enter into a competition, even if another franchise be granted; but competition is excluded or prevented by the operation of natural laws, and not by the terms of the statute or ordinance.

While we hold that the defendant company has a right to enter upon all such streets as the council, in the reasonable exercise of its discretion, may designate, this is not necessarily inconsistent with the existence of another street railway system in the same city, operating under another franchise embodying the same general terms and conditions.

Turning, as the case does, so largely upon the construction of our own statutes, we think it unnecessary to go into any extended review of the many authorities cited by counsel. We have examined all of them, and find none which is necessarily inconsistent with our conclusion.

It follows that the judgment below must be reversed, and the cause will be remanded, with directions to the trial court to sustain the motion for dissolution of the injunction. Costs of appeal will be taxed against the appellee.

Reversed.

Cotant v. Boone Suburban Railway Co.

(Iowa — Supreme Court.)

1. INJURY TO PASSENGER BY DEFECTIVE EXIT AT STATION.¹—The plaintiff, a passenger on one of the cars of the defendant, alighted therefrom at a station. A stile had been erected by a third person over a wire fence which separated the defendant's right of way from adjoining property for the purpose of permitting passengers to go from the station to a pleasure-ground upon such adjoining property. The plaintiff attempted to pass over such stile, and as he started to descend from the top caught

Defects in stations and places of exit.—The general rule as applied to steam railroads requiring them to provide and maintain safe and adequate station-houses, platforms, and places of egress and ingress for those leaving and approaching trains does not apply to the same extent to ordinary street surface railroads. This is obvious from the difference in the method of operation. Street cars operated in streets and highways are required to stop at frequent intervals, regardless of the existence of permanent stations and

his foot, was thrown to the ground, and received the injuries of which he complains. It appeared that the stile was defectively constructed. It was insisted by the defendant that since it did not erect the stile and had no right to enter upon the adjoining grounds to repair it, it could not be held liable for any injury resulting from the use thereof; but the court held that since the contrivance was used by the defendant's passengers alone, and it knew that it was being so used, it was bound to at least ordinary care in seeing that it was fit for the purpose for which it was intended; that from the evidence the jury was justified in finding that there was an implied invitation to its passengers to use such contrivance.

2. **EXISTENCE OF OTHER MEANS OF EGRESS.**—It appearing that there was an opening in the fence 400 or 500 feet from the station, it was a question for the jury as to whether or not the plaintiff was negligent in failing to take advantage thereof.
3. **LIABILITY OF DEFENDANT FOR DEFECTIVE CONDITION OF STILE.**—The duty of a carrier of passengers does not end when the passenger has alighted from its cars. It must provide reasonably safe means of access to and from its stations or terminals for the use of its passengers, and the passengers have a right to assume that the means of egress provided are reasonably safe. The defendant having knowledge of the construction of the stile and impliedly inviting its passengers to use it is liable for its defective condition, although it was erected by a stranger.

APPEAL by defendant from a verdict and judgment for the plaintiff. Decided April 6, 1904. Reported 124 Iowa, , 99 N. W. 115.

W. W. Goodykoontz and Dowell & Parrish, for appellant.

C. T. Cotant and Ganoë & Hollingsworth, for appellee.

Opinion by DEEMER, C. J.

Defendant owns and operates an electric railway from the city of Boone to the Des Moines river, near what is known as the "High Bridge" of the Chicago & Northwestern railway, and on

platforms, for the purpose of permitting passengers to board and alight from the cars. But electric railways are operated frequently between cities and villages, and their lines are constructed over rights of way owned by the companies. In such cases it is frequently required to construct and maintain stations and platforms at places convenient of access to patrons. Where such is the case it is probable that the strict rule as applied to steam railroads will, under such circumstances, be also applied to electric railways.

A person leaving the station of a railroad company in the usual way and in a reasonable manner is entitled to the protection of a passenger until

the 4th day of July, 1901, was carrying passengers over the said line for hire. The west or river end of this railway ran for some distance parallel to, and immediately north of, the right of way of the Chicago & Northwestern Railroad Company, and the rights of way of the two companies were separated by a wire fence. Just prior to the 4th day of July, 1901, one Spraker, who owned some land south of the steam railway right of way, which he used as pleasure ground, constructed a stile over this wire fence, which was made by placing two ladders, each eight or ten feet in length, and fourteen or sixteen inches in width, in such a position as that two ends met over and above the fence, while the other ends were set in the earth on either side thereof. Boards running parallel with the sides of the ladders were nailed thereon, and strips or cleats at short intervals were fastened to these boards. There were no railings or handrails, and no lateral supports.

he has left the company's premises. *Keefe v. Boston, etc., R. Co.*, 142 Mass. 251, 7 N. E. 874; *Hartig v. Lehigh Valley R. Co.*, 154 Pa. St. 364, 26 Atl. 310.

The rule in relation to the liability of railroad corporations for injuries sustained by passengers by reason of defects in the approaches to the cars, such as platforms, halls, stairways, and the like, differs from that which obtains in the case of an injury to a passenger while he is being carried over the road of the corporation, and where the injury occurs from a defect in the roadbed or machinery, or in the construction of the cars, or where it results from a defect in any of the appliances, such as would be likely to occasion great danger and loss of life to those traveling on the road. The rule in the former case is that the carrier is bound simply to exercise ordinary care in view of the danger to be apprehended, and for the reason that the consequence of a neglect of the highest care and skill which human foresight can attain to are naturally of a much less serious nature. See *Nellis Street Railroad Accident Law*, p. 181, and cases cited in note 88. In the case of *Leveret v. Shreveport Belt Line Co.*, 1 St. Ry. Rep. 253, 110 La. 399, 34 So. 579, it was held that a railway company which uses as a station for embarking or disembarking its passengers, a pavilion constructed upon a street, is liable to a passenger for injuries received from the breaking of a rotten plank in the steps leading to the cars, whether the station was constructed by it or not. In the case of *Finsetti v. Suburban R. Co.*, 32 Oreg. 1, 51 Pac. 84, 39 L. R. A. 517, it was held that a street railway company which constructs a walk over a street temporarily submerged by a freshet for the use of passengers in going from one car to another, is not, as matter of law, required to provide a light for such walk at night, but is required to make such walk reasonably safe, but not to make it "as reasonably safe as possible."

Plaintiff took one of defendant's trains in the city of Boone, rode out to the western terminal at or near the Des Moines river, alighted from the car, and, seeing this stile, which was near where the train stopped, attempted to pass over it, and, as he started to descend from the top, caught his foot in such a way as that he was thrown to the ground, and received the injuries of which he complains. He said on the witness stand that as he took the second step down, and placed the weight on his foot, something broke or turned with him, causing him to lose his balance and to fall to the ground; that his foot was caught and held, so that his head and shoulders struck the ground. The alleged grounds of negligence are that

"The said stile was without railing or means of lateral support, and that the defendant, its agents or servants, so carelessly and negligently constructed, appropriated, maintained, and used said unsafe and dangerous ladder and stile, and so negligently and carelessly failed, refused, and neglected to assist plaintiff at any time or in any manner in getting over said ladders or stile or barb-wire fence, in departing from the defendant's said grounds, and so failed, refused, and neglected to provide safe means of egress and ingress from or to said grounds, as to cause each and all of the damages set out in the petition; that said stile or ladder was so defectively constructed of light and defective timber as to break and give way, and thus throw plaintiff to the ground and break his leg, causing the injury complained of."

Defendant denied any negligence on its part, and pleaded contributory negligence on the part of the plaintiff. Many points are relied upon for a reversal, the more important of which we shall consider in the order presented by appellant's counsel in their brief.

The first proposition made by them is that as defendant did not erect the stile, had not assumed control thereof, and had no right to enter upon the land of the steam railway, either to inspect or to repair it, it owed plaintiff no duty with respect thereto, and cannot be charged with negligence either in the construction or maintenance of this device. The trial court gave the following, among other instructions: "You are instructed that, after completing its road, defendant was under no obligations to build or erect a stile or stairs over the fence from the right of way leading over and into the right of way of the Chicago & Northwestern railway; but if you find from the evidence that said stile

in question was constructed partly on defendant's grounds and partly on the grounds of the Chicago & Northwestern Railway Company, and that the same was used by the passengers from defendant's cars as the usual means of egress from said grounds, and such fact was known to defendant, and defendant permitted the same, and there was no other reasonable or safe way of egress from said grounds, then the fact that said stile was partially upon the grounds of the Chicago & Northwestern Railway Company would not relieve defendant of the obligation to exercise ordinary care in keeping said stile in a reasonably safe condition, if it allowed the same to remain and be used as the only reasonable means of egress from its grounds." From the statement already made, it will be observed that the accident occurred on that part of the stile which was over and upon the right of way of the Chicago & Northwestern railroad, and it is contended that defendant's responsibility ceased when the passenger passed upon the ground of another carrier; that, at most, it was under no other duty to the plaintiff than to warn him of danger of which it had notice or knowledge, and that its liability is not greater than if the stile had been erected jointly by the steam railway company and the defendant. The defendant did not erect the stile, and there is no evidence that the Chicago & Northwestern Railroad Company had anything to do with it. Little need be said in support of the proposition that this stile was a dangerous contrivance. The jury so found, and we have no doubt of the correctness of its finding. But defendant strenuously insists that, as it had no right to enter upon the grounds of the other company to repair the device, it cannot be held liable for any injury that may have resulted from the use thereof. Ordinarily this proposition is true, but it must be remembered that this contrivance, while partly on or over the land of the Chicago & Northwestern Railroad Company, was a single, complete device, and formed a continuous passageway over the fence; and if defendant invited its passengers to use it, either expressly or by implication, it was bound to at least ordinary care in seeing that it was fit for the purpose intended. That it had no right to go upon the grounds of the Chicago & Northwestern Railroad Company to make inspection or repairs is not controlling. Its passengers were not

bound to ascertain at their peril what part of this stile was on the premises owned by another company, and what right defendant had to use it. Defendant undoubtedly had the right to make arrangements with another company for the construction of a stile and for permission to its passengers to cross its right of way; and, having invited the traveling public to use the device, it will not be permitted to say that it had no right to erect part of the contrivance upon grounds of another company. It will not do to say that the traveling public must inquire in such cases as to the right the carrier had to pass upon the grounds of another company to make repairs. This contrivance was used by defendant's passengers alone. It was not built to accommodate the steam railway or its passengers. The use made of the railway right of way was permissive only. That company had no interest in the device, did not profit therefrom in any way, and was not using it for the benefit of its patrons. It did not owe the plaintiff or the defendant company any duty whatever with reference to this stile, and the plaintiff was not going upon its grounds for the purpose of taking its trains, or for any other purpose than simply to cross them. In so doing, he was nothing more than a licensee, and the steam railway company was under no obligation to look after his safety in coming upon its premises. The use made of the stile was for the joint benefit of the defendant company and the owner of the pleasure grounds. The jury was justified in finding that the defendant company knew that it was being used by its passengers, and that it was in a dangerous condition. It was also justified in finding, on account of its position and the manner in which defendant stopped its trains and operated its road, that there was an implied invitation to its passengers to use the device in going to the high bridge and to the picnic grounds of Spraker, the man who constructed the stile. Had the contrivance been constructed by the defendant and the Chicago & Northwestern Railroad Company jointly for the use of the passengers of either line, both would undoubtedly have been liable for an injury received by a passenger. The rule seems to be "that the depot and connected grounds, visited by coming and going passengers, should be fitted up with a careful regard for their comfort and safety. The approaches, the tracks around the

platform for entering and leaving the cars, the passages of the cars, every spot likely to be visited by passengers seeking the depot, waiting at it for its trains or departing, should be made safe, and kept so." Bishop, Noncontract Law, § 1086. See also *Lucas v. Pennsylvania Co.* (Ind. Sup.), 21 N. E. 972, 16 Am. St. Rep. 323, and cases cited. Here there was no liability on the part of the steam railway company, but the situation was such as to make it natural for a person alighting from defendant's train as plaintiff did, intending to go to the bridge or to the pleasure grounds, to use the stile in passing over the fence. Defendant was bound to know that persons alighting from its trains would likely use this device in passing to their destination, and it was its duty to use at least ordinary care in seeing that it was properly constructed and in good repair. The following cases lend support to our conclusions on this point: *Cross v. Lake Shore Co.* (Mich.), 37 N. W. 361, 13 Am. St. Rep. 399; *Collins v. Toledo Co.* (Mich.), 45 N. W. 178; *East Tenn. Co. v. Watson* (Ala.), 10 So. 228; *Delaware Co. v. Trautwein* (N. J.), 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442.

2. The defendant asked an instruction to the effect that, if the jury found the injury was due to a defective step or board in the stile, it would not be liable, unless it knew, or in the exercise of ordinary care should have known, of this defective condition. This thought was embodied in one of the instructions given by the trial court, and defendant has no cause of complaint.

3. Instruction 10, which reads as follows, is complained of:

"If you find from the evidence that the stile in question was constructed partly upon the ground of defendant company, and that the same was ordinarily and generally used by those who were passengers on defendant company's cars as a means of egress from said grounds, where the railway of defendant terminated, and that there was no other reasonable means of egress from said grounds, and that said defendant company knew that said stile was so used by passengers upon its cars in leaving said grounds, and that it permitted them to do so; and you further find that said stile, by reason of its narrowness, or by reason of the fact that there was no railing thereon, or by reason of the fact that said stile was constructed of light and defective lumber, if such you find the fact to be, was not such means of egress from said grounds as an ordinary person would provide under similar circumstances — you will be justified in finding the defendant guilty of negligence, as charged. If, however, you find that the said stile was such as an

ordinary person would employ under similar circumstances as a means of egress from said grounds, then there would be no negligence upon the part of defendant."

The criticism is that there was no evidence upon which to base it. Suffice it to say that we find in the record ample testimony to justify the instruction.

4. Instruction 19, relating to the measure of damages, is also challenged. It reads as follows:

"If you find him entitled to recover, he should be allowed a fair and reasonable compensation for his injuries. In estimating his damage, no precise rule can be given for the amount to be allowed, as they are not in their nature susceptible of exact money valuation. You are to use your own sense and judgment, and be guided by the evidence, in allowing him such sum as will reasonably compensate him. In making up this amount, you should award, as may appear from the evidence, the reasonable value of the time lost because of the injury, the amount he has paid for medical attendance and nursing, and fair compensation for the bodily pain and suffering caused by the said injury; and if you further find that plaintiff's injuries are permanent, and will, to some extent, disable him in the future, and cause him pain and suffering hereafter, you should also allow him such further sum as, paid now in advance, will reasonably compensate him for such future disability, pain, and suffering as the evidence shows it is reasonably probable will result to him in the future from such injuries."

The first point made with reference to this is that there is no testimony on which to base an allowance for future disability. The evidence clearly shows that plaintiff was suffering from his injuries at the time of trial, and the experts testified that his injury would probably be permanent. Plaintiff testified that he was earning fifty dollars per month before the injury, and had not been able to earn more than ten dollars since. This was sufficient to take the case to the jury. *Smith v. Sioux City* (Iowa), 93 N. W. 81; *Winter v. Railroad Co.* (Iowa), 45 N. W. 737; *Ashley v. Sioux City* (Iowa), 93 N. W. 303. Next it is argued that the instruction runs counter to the rules announced in *Fry v. Railroad Co.*, 45 Iowa, 416, and *Laird v. Railroad Co.*, 100 Iowa, 336, 69 N. W. 414. A reading of these cases will sufficiently demonstrate the incorrectness of this proposition. Abstractly considered, the instruction has support in *Baily v. City*, 108 Iowa, 20, 78 N. W. 831; *Miller v. Boone County*, 95 Iowa, 5, 63 N. W. 352; *Smith v. Sioux City*, *supra*.

5. Lastly it is argued that the verdict is contrary to the instructions. The principal contention here is that there was another means of egress from the defendant's grounds, whereby plaintiff could have reached his destination with safety. There was testimony to the effect that there was an opening in a barbed-wire fence forty rods away, but it was not a place which afforded a reasonable means of egress from the defendant's terminal. Another opening in the fence, 400 or 500 feet away, was spoken of by one witness, but it was not in sight, and the witness said that it may have been closed on the day of the accident. It was clearly a question for the jury to say whether or not there was another reasonably safe and accessible place of exit from the grounds where the railway terminated, and as to whether or not plaintiff was negligent in not taking it.

In conclusion, we may say that the case was submitted to the jury on two theories: One, that the stile, by reason of its narrowness, or for want of railings, or because it was constructed of light or defective materials, was not such means of egress as an ordinarily prudent person would provide, in which event defendant might be found guilty of negligence; and the other, that the injury was due to a defective board in said stile, in which event defendant would not be guilty of negligence, unless it knew, or in the exercise of reasonable care should have known, of its defective condition. The latter theory was bottomed on the thought that the stile itself was not dangerous, save as it had a defective board. What we have said in the second division of this opinion has reference to this last contention. On the other proposition, defendant was liable for the defective condition of the stile, although it was erected by a stranger. Defendant had full knowledge of the construction of the stile, and impliedly invited its passengers to use it. Under such circumstances, its liability is the same as if it had itself set up and maintained the device. See cases hitherto cited, and *McDonald v. Railroad Co.*, 26 Iowa, 124, 95 Am. Dec. 114; *Beard v. Railroad Co.*, 48 Vt. 101; *Gilmore v. Railroad Co.* (Pa.), 25 Atl. 774; *Watson v. Land Co.* (Ala.), 8 So. 770. This rule is bottomed on the proposition that the duty of a carrier of passengers does not end when the passenger has alighted from its cars. It must also provide reasonably safe

means of access to and from its stations or terminals for the use of its passengers and the passengers have a right to assume that the means of egress provided are reasonably safe. This duty it cannot delegate to another so as to relieve itself from responsibility. See cases hitherto cited. Defendant's contention that it is not liable because the stile was erected by a stranger is unsound in principle, and not sustained by authority. When it invited its passengers to use this stile, it, in effect, represented that it was reasonably safe for the purposes intended; and, when injury occurred by reason of its unsafe or faulty construction, it should not be allowed to shield itself behind another, and to say that it did not know of its defective construction. *Gulf F. R. Co. v. Glenk* (Tex. Civ. App.), 30 S. W. 278, and cases cited.

The instructions were even more favorable to the defendant than it was entitled to. We are not to be understood as approving all of them. Suffice it to say that defendant was in no manner prejudiced either by those given, or by the refusal of the court to give those asked by it. Our observations in the second paragraph of this opinion must be construed with reference to these suggestions.

There is no prejudicial error in the record, and the judgment must be, and it is, affirmed.

BISHOP, J., taking no part.

Cummings v. Wichita Railroad & Light Co.

(Kansas — Supreme Court.)

PASSENGER INJURED BY BEING STRUCK BY TROLLEY POLE AT THE SIDE OF A CAR;¹ CONTRIBUTORY NEGLIGENCE.—The plaintiff, while a passenger on one of the open cars of the defendant, momentarily leaned outside the car and was struck by a trolley pole erected close to the side of the track. He did not know of the proximity of the pole to the car. The car was not screened on either side, and was so constructed that passengers could enter and depart from either side. It was held that under the circumstances the question of the contributory negligence of a passenger was one of fact for the jury.

1. Collision with obstacles near track.—The highest degree of care is required in avoiding collision with obstacles on or near the track of a street railroad from which danger might be anticipated. 6 Cyc. 625, citing High-

~~Error~~ brought by plaintiff from judgment for defendant. Decided January 9, 1904. Reported (Kan.), 74 Pac. 1104.

J. V. Daugherty and Thos. B. Wall, for plaintiff in error.

Kos Harris and V. Harris, for defendant in error.

Opinion by GREENE, J.

This was an action to recover damages for personal injuries alleged to have been sustained through the negligent construction and operation of a street-car system by the defendant in the city of Wichita. It appears from the petition and opening statement of counsel for plaintiff in error that the defendant came into possession of the property of the Wichita Electric Light Company, a company which had theretofore owned and operated a system of street railway in said city. It had laid a double track in the center of North Main street, in said city, with its trolley poles between the tracks. When the property came into the possession of the defendant, it replaced the old cars with new ones, which were a foot wider, but did not relay, or increase the distance between, the tracks. There was only a distance of ten or twelve inches between the poles and the sides of the cars. On the night of September 25, 1901, the defendant was running its summer cars on its double track on North Main street. These cars were so constructed that the seats were across the car, with posts on either side at the end of the seats, and an aisle in the center. The seats at the ends of the car were not reversible, and this car was entered from the sides upon a running-board. About 10 o'clock on the evening in question the plaintiff took passage on one of these open cars on North Main street, going south. He

land Ave., etc., R. Co. v. Swope, 115 Ala. 287, 22 So. 174; Kird v. New Orleans, etc., R. Co., 105 La. 226, 29 So. 729.

The question of the negligence of a street car company in an action brought for injuries caused by a collision with an obstacle upon the side of the track in close proximity to a car is for the jury, even if the passenger at the time of the accident was seated with his hand and arm outside the window of the car. Dahlberg v. Minneapolis St. Ry. Co., 32 Minn. 404, 21 N. W. 545, 50 Am. Rep. 585. See also Seymour v. Citizens' Ry. Co., 114 Mo. 266, 21 S. W. 739; Zelif v. North Jersey St. Ry. Co., 1 St. Ry. Rep. 541, 69 N. J. L. 541, 55 Atl. 96.

sat on the front seat, with his back to the front of the car, and on the side next the trolley poles, or on the left side going south. He did not know the distance the poles were from the cars. While thus riding, one of the passengers, two seats in front, addressed him. The sound of her voice being obstructed by the passengers in the seats between them, he involuntarily and momentarily, without rising, leaned his head out of the car, that he might hear her; and, as he did so, his head came in contact with one of the company's trolley poles. The defendant pleaded a general denial and contributory negligence, to which the plaintiff replied by general denial. After the opening statement of counsel for plaintiff, the defendant moved the court for judgment upon the pleadings and statement. The motion was sustained, and such judgment entered. It appears the motion was sustained upon the ground that the petition and opening statement showed that the plaintiff was guilty of such contributory negligence as would bar a recovery.

The only question is, was the act of plaintiff in thus putting his head outside the car, as matter of law, such contributory negligence as would bar a recovery? It is the well-settled law of this State that, if the ordinary negligence of plaintiff directly or approximately contributed to his injury, he cannot recover damages occasioned by the negligence of the defendant, unless the injury was wantonly or intentionally caused by defendant. *Tennis v. Rapid Transit Ry. Co.*, 45 Kan. 503, 25 Pac. 876; *Union Pacific Ry. Co. v. Adams*, 33 Kan. 427, 6 Pac. 529; *Gibson v. City of Wyandotte*, 20 Kan. 156; *Williams v. Atchison, T. & S. F. R. Co.*, 22 Kan. 117; *Artman v. Kansas Cent. Ry. Co.*, 22 Kan. 296. The question whether a passenger who puts his arm out of a street car window is guilty of imputable negligence ordinarily presents a question of fact for the jury. *Dahlberg v. Minneapolis Street Ry. Co.*, 32 Minn. 404, 21 N. W. 545, 50 Am. Rep. 585; *Tucker v. Buffalo Ry. Co.* (Sup.), 65 N. Y. Supp. 989; *Francis v. New York Steam Co.*, 114 N. Y. 380, 21 N. E. 988; *Germantown Passenger R. Co. v. Brophy*, 105 Pa. St. 38; *Summers v. Crescent City R. Co.*, 34 La. Ann. 139, 44 Am. Rep. 419. Was the involuntary act of plaintiff in leaning his head outside a summer car, not knowing that the trolley poles were so

close to the side of the car, as matter of law, such negligence? Ordinary negligence is the omission to exercise ordinary care — that degree of care generally exercised by an ordinarily prudent person under like circumstances. In determining whether a plaintiff in an action for personal injuries has been guilty of such negligence as directly and approximately contributed to his injury, reference must necessarily be had to the particular transaction out of which the injury arose, the instrumentality causing it and its use, the means and purpose of its operation, the relation and duty of the parties one to the other, and the knowledge possessed by the injured party. If from all these facts reasonable minds might draw different inferences and reach different conclusions with respect to the danger of the situation and the proper course which the injured party should have taken, the question of negligence is one of fact for the jury, and not of law for the court. In *Beaver v. A., T. & S. F. R. Co.*, 56 Kan. 514, 518, 43 Pac. 1136, 1137, it is said: "Before the case could be taken from the jury on the ground of contributory negligence, it should be established beyond cavil or dispute, leaving no room for differences of opinion upon the question." *Davis v. City of Holton*, 59 Kan. 707, 54 Pac. 1050; *Railroad Co. v. Powers*, 58 Kan. 544, 50 Pac. 452. In the present case the plaintiff was riding in what is commonly called a "summer street car," open from top to bottom on the sides, from which people entered and departed by stepping on what is called a "running-board." These boards extend along and outside the car from one end to the other. While thus riding, and in response to a question by a fellow passenger, not knowing the proximity of the pole to the car, in order that he might hear he put his head out ten inches beyond the side of the car when it came in contact with the pole. There were no screens on either side of the car upon which plaintiff was riding, and it was so constructed that passengers were invited to enter and depart from either side. In view of this, might not plaintiff have assumed that the company maintained no dangerous obstructions so close to the side of the car that passengers might not enter or depart, as invited by the company, without danger of injury? Might he not have acted on this assumption, and put his limbs or head out the distance of ten inches, and not,

as matter of law, be said to be guilty of contributory negligence? In doing so, under such circumstances, could it be said, as expressed by this court in *Beaver v. A., T. & S. F. R. Co.*, *supra*, that, "before the case could be taken from the jury on the ground of contributory negligence, it should be established beyond cavil or dispute, leaving no room for differences of opinion upon the question." But this is not the exact question. The plaintiff did not act upon deliberation and upon the apparent conditions indicated above. His act was casual, involuntary, and without previous knowledge of the close proximity of the pole to the car. The question is, what would an ordinarily prudent man have done under like circumstances? Can it be said that no two reasonable minds might not give different answers to this question? Should he have arisen and leaned forward over the passengers in front of him, or should he have gone into the aisle and walked to the passenger addressing him, or should he have done as he did? What is the exercise of ordinary care under such circumstances is a question of fact for the jury, and not a question of law to be determined by the court.

The case is, therefore, remanded, with instructions to set aside the judgment and overrule the motion.

All the justices concurring.

Kansas City — Leavenworth R. Co. v. Gallagher.

(Kansas — Supreme Court.)

1. INJURY TO PEDESTRIAN; INSTINCT OF SELF-PRESERVATION.1.— In the absence of evidence to the contrary, a jury may infer from the universal instinct of self-preservation that a person about to cross an electric street railway track both looked and listened before venturing to do so.

As to presumption arising from instinct of self-preservation see note to *Ames v. Waterloo*, etc., R. T. Co., 1 St. Ry. Rep. 199. See also *Nellis Street Railroad Accident Law*, p. 585, where this entire question is ably discussed and all the leading questions applicable to street railways are cited.

Duty to look and listen.— The cases reported in this series relating to this question are cited in the note to *Chicago City Ry. Co. v. O'Donnell*, *ante*, p. 172; see also monographic note to *Wolf v. City & Sub. Ry. Co.*, 1 St. Ry. Rep. 667.

2. DUTY TO LOOK AND LISTEN; WHEN FAILURE NOT NEGLIGENCE.— It is the duty of a pedestrian upon a city street, who is about to cross the track of an electric street railway company, to exercise his faculties of sight and hearing, and in other respects to take ordinary precautions to avoid collision with the cars. If he do look and listen, he will be held to an apprehension of that which should have been seen and heard, and, if he fail to look and listen, he will be charged with the same liability in case of disaster as if he had done so. But a traveler may cross an electric street railway track in front of an approaching car which he plainly sees and distinctly hears, and not be negligent. If, in view of his distance from the car, the rate of speed of its approach, and all other circumstances of the event, a reasonably prudent man would accept the hazard and undertake to cross, a traveler may do so, and the propriety of his conduct is ordinarily a question for the jury.

(Syllabus by the court.)

ERROR by defendant from judgment for plaintiff. Decided February 6, 1904.
Reported (Kan.), 75 Pac. 469.

Atwood & Hooper, for plaintiff in error.

Jno. T. O'Keefe and Benj. F. Endres, for defendant in error.

Opinion by BURCH, J.

A street sweeper of a city street, while engaged in the performance of his duties, at night, was run down and killed by an electric street railway car. The car was running at a speed of from twenty to twenty-five miles per hour, while the rate allowed by the ordinances of the city was but twelve miles per hour. The track was "sweaty," and because of its slippery condition a moving car was difficult to control. The conductor and motorman in charge of the car discovered the employee of the city when 100 feet distant from him. He was then upon the track between its rails, and in the act of walking across it. The car conductor shouted to him, but the bell was not sounded or other warning given. Two railway engines were standing a short distance beyond the place of accident, one of which was taking water and the other noisily emitting steam, while the wind blew from the direction of the engines toward the pedestrian and the car. When the man was observed the motoneer set the brakes, which locked the car wheels, but not so quickly as if the brakes had been in good repair. The proper method of overcoming the momentum of the

car would have been to apply sand to the track, but the apparatus for the use of sand was out of repair, and that expedient was not adopted at all. The car was properly lighted, and some street lights were burning in the vicinity, and, if it had been properly equipped, operated, and controlled, the car could have been stopped within a distance less than that intervening between the man and the car when he was discovered to be upon the track. The deceased was struck by the corner of the car on the side of the track toward which he was walking, and by force of the collision his body was thrown still farther away from the track. He was in good health and had good eyesight and good hearing. He was familiar with the track and the manner and mode of running cars upon it along the street in question, and knew about how often cars passed the place of injury. He had an unobstructed view of the railway track for 610 feet in the direction from which the car came. There was nothing to prevent his seeing the car as it approached him if he had looked, and, if he had heard or heeded the shouting of the conductor, he then had time to leave the track and avoid the collision, and had the ability to do so. But there is nothing to show either that he did or did not look for an approaching car, or that he did or did not see or hear the one which struck him. Under these circumstances, was the deceased guilty of such contributory negligence that his widow may not recover from the company operating the car the damages occasioned by his death?

The defendant company argues the case as if the deceased man either looked and listened for an approaching car or did not do so; that he was negligent if he failed to take so much precaution for his own welfare; that he must be held to have noted the proximity of the car if he did look and listen; and that a reasonably prudent man, after looking and listening, would have avoided a collision. It is true that a traveler upon a city street, who is about to cross the track of an electric street railway company, should exercise his faculties of sight and hearing, and in other respects take ordinary precautions to avoid collision with the cars. If he do look and listen, he will be held to an apprehension of that which should have been seen and heard, and, if he fail to look and listen, he will be charged with the same liability in

case of disaster as if he had done so. These principles meet the tests both of reason and of practical application to the affairs of men. *Burns v. Railway Co.*, 66 Kan. 188, 71 Pac. 244. But a jury may infer ordinary care and diligence on the part of an injured person from the love of life, the instinct of self-preservation, and the known disposition of men to avoid injury. *Dewald v. K. C., Ft. S. & G. Ry. Co.*, 44 Kan. 586, 24 Pac. 1101. And, in the absence of evidence to the contrary, it will be presumed that a person about to cross a railroad track both looked and listened before venturing to do so. *C., R. I. & P. Ry. Co. v. Hinds*, 56 Kan. 758, 44 Pac. 993.

"There was no error in instructing the jury that, in the absence of evidence to the contrary, there was a presumption that the deceased stopped, looked, and listened. The law was so declared in *Texas & P. R. Co. v. Gentry*, 163 U. S. 353, 366, 41 L. Ed. 186, 192, 16 Sup. Ct. 1104. The case was a natural extension of prior cases. The presumption is founded on a law of nature. We know of no more universal instinct than that of self-preservation; none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming, and death. There are few presumptions based on human feelings or experience that have surer foundation than that expressed in the instruction objected to." *Baltimore & P. R. Co. v. Landrigan*, 24 Sup. Ct. 137, 47 L. Ed.

Since the evidence in this case gives no account of the street sweeper on the night of the fatality until he was suddenly seen in a place of peril on the railway track, with the enginery of death bearing swiftly down upon him, these presumptions should be indulged in his favor, and the case determined as if he had chosen his gait in crossing the track with reference to an observation of his surroundings. Conceding, then, that the traveler looked for whatever was to be seen and listened for whatever was to be heard, and duly apprehended the report of his senses, still he cannot be summarily condemned. A man may cross an electric street railway track in front of an approaching car which he plainly sees and distinctly hears, and not be negligent. Hundreds of people do so every day, and yet satisfy every demand for care and caution which the law imposes upon them. The requirement of the law that a man shall look and listen means no more than that he shall observe and estimate with reasonable accuracy his distance from the car and the speed of its oncoming. He

is then to make a calculation and comparison of the time it will take the car to come and the time it will take to cross the track, and if, under the same circumstances, a reasonably prudent person would attempt to cross at a given rate of speed, he will not be negligent in doing so. It is true that a reasonably prudent man may be mistaken or be deceived, but, if so, and if his conclusion from the facts as they appear to him be erroneous, and an injury result, he is nevertheless guiltless of contributory negligence, for the law does not measure human conduct in such cases by any higher standard of care than that which such a man would exercise; and whether or not a prudent man would accept the hazard is generally a question of fact for the jury.

"It is consistent with the facts proved that Lawler saw the approaching car, and without negligence on his part failed to observe from his position the unusual speed at which it was running, so that his conclusion that he could safely cross was not an unreasonable one. Clearly, it is not negligence in law for one to cross a street railway track in front of an approaching car which he has seen, and which does not appear to him to be dangerously near, and which would not have been so in fact had it been running at its ordinary rate of speed. Whether one who has observed an approaching street car should have also apprehended that it was approaching at such a speed as to reach him before he could cross the track, is generally a question of fact to be determined upon the circumstances of each particular case." *Lawler, Admr. v. Hartford Street Ry. Co.*, 72 Conn. 74, 82, 43 Atl. 545. "He who puts himself in the way of runaway horses who have escaped from the driver's control must know that he is taking a risk. But a jury may well say that he who crosses in front of a trolley car provided with a motorman may assume that it is furnished with the means of stopping or reducing speed. Then there was a question for the jury in this case whether a prudent man, upon such an assumption, might not judge it safe to cross in front of a trolley car 300 feet away, although coming at great and illegal speed. Upon the assumption of the existence of means to reduce speed and to stop, and of a servant employed to make use of such means, it would be absurd to say that one was bound to refrain from crossing for fear the servant would not make use of the means." *Consolidated Traction Co. v. Lambertson*, 59 N. J. L. 297, 299, 36 Atl. 100. "It would be palpable negligence for the driver of a wagon or carriage to recklessly drive upon a crossing in a race with an approaching car. In all such cases it should be held that the driver of the vehicle takes his chances of a collision, and he ought to have no remedy if an accident occurs. But no principle of law or common sense requires that the driver of a vehicle should stop his team, and await the passing of an approaching car, if he discovers the car on the line at such a distance as that, in the exercise of reasonable care and pru-

dence, he may safely proceed on his way, and cross the track. Much is said in argument about the question whether the rule requiring a person about to cross the track to stop and look and listen for an approaching car, and whether the rule applicable to a railroad operated by trains and steam locomotives, should apply to an electric railroad. That question is not in this case. There is no claim that plaintiff did not see the approaching car. He saw it when it was 300 feet away from the crossing. The question is, did he use proper care and caution in determining whether he could safely cross the track? That was a fair question, under the evidence, for the jury to determine." *Patterson v. Townsend & Son*, 91 Iowa, 725, 726, 59 N. W. 205. See also *Schmidt v. Burlington, C. R. & N. Ry. Co.*, 75 Iowa, 606, 39 N. W. 916; *Gratiot v. Mo. Pac. Ry. Co.*, 116 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189; 2 *Thomps. Neg.*, § 1450.

What, then, was the situation of the street sweeper in this case? The car was hurtling through space at a rate of speed far in excess of that allowed by the city law. An observation of it would not have indicated peril, and would not have dictated haste in crossing, unless this high and dangerous rate of speed were appreciated. The sweeper had the right to rely upon a compliance with the law on the part of the company, and to believe the speed of the car to be within twelve miles per hour, and under the control of the motoneer. The mingling lights and shadows of the night necessarily rendered vision inaccurate and uncertain. The man was not bound to regard a shout as a street car signal, and other sounds were opposed to the noise of the flying car. Under these circumstances an unexpected and unlawful acceleration of speed might well deceive a reasonably prudent and careful man, and delude him into danger; and, if he were cognizant of the true rapidity of the car's motion, he might nevertheless feel secure that it would be reduced to the lawful rate by a vigilant motor-man in command of efficient appliances in good repair, before it could overtake him. So considered, the facts already narrated, which seem especially to militate against a belief in the carefulness of the deceased, are not irreconcilable with a liability on the part of the company. In the light of such facts different minds might arrive at different conclusions as to what might, under all the circumstances, have been done without blame. The question, therefore, is not one of law, but is one of fact, and the general verdict against the company is conclusive.

Some complaint is made of instructions given and refused at the trial. Under the view of the case taken above, the instruc-

tion given relating to reciprocal rights upon the streets could not have been prejudicial. In the next instruction given the allusion to the safety of passengers occurs in a recital of duties evidently taken from the city ordinance granting the defendant the right to use the streets, and could not have misled the jury; and the objection that this instruction permitted a recovery if the defendant "negligently failed and neglected in any manner to care for the safety of the life and personal safety of the plaintiff's intestate" ignores the succeeding words "as alleged." The subject-matter of two of the instructions refused, referred to in the defendant's brief, was covered by instructions given, and the third conflicts with the views set forth above.

Since no material error appears to have been committed by the District Court, its judgment is affirmed.

All the justices concurring.

Hoffmeier v. Kansas City & Leavenworth Railroad Co.

(Kansas — Supreme Court.)

INJURY TO CONDUCTOR CAUSED BY CONTACT WITH POLE NEAR TRACK; ASSUMPTION OF RISK.—A conductor while collecting fares stood upon the running-board of an open car and was struck by a pole negligently erected by the defendant near the track. In the absence of evidence showing that the conductor had actual knowledge of the location of the pole, or that its proximity was so patent as to exclude his ignorance, he cannot be held to have assumed the danger, or to have been negligent in not discovering it.

ERROR brought by plaintiff from judgment for defendant. Decided March 12, 1904. Reported (Kan.), 75 Pac. 1117.

F. B. Dawes and *L. H. Wulfekuhler*, for plaintiff in error.

A. L. Berger (*H. L. Alden*, of counsel), for defendant in error.

PER CURIAM.

The record in this case presents the proceedings in an action for damages for personal injuries claimed to have been negli-

As to injuries to street railway employees caused by contact with poles erected in close proximity to tracks, see *Govan v. New Orleans & C. R. Co.*, 2 St. Ry. Rep. 335, 111 La. 125, 35 So. 484; *Houston Elec. Co. v. Robinson*, 2 St. Ry. Rep. 893, (Tex. Civ. App.) 76 S. W. 209.

gently inflicted. The decision depended upon the probative force of facts. The trial court dispensed with the service of the jury, and drew the definitive conclusion itself.

The plaintiff was the conductor of an electric street railway car. The car was without an aisle or other passageway lengthwise through it, and the conductor was obliged to perform his duties from a footboard running the length of the car on its outside. The electric current was conveyed to the car by a wire supported by poles placed at the side of the track, and at haphazard distances from it. These poles, in the long course of a tortious track, zigzagged from one side of it to the other, and, through a skimped and niggard plan of construction, some of them were so near as to imperil the safety of a conductor in the performance of his duties in the collection of fares from passengers aboard the car. The plaintiff was struck by a pole on a trestle, and when knocked from the car fell some twenty-five or thirty feet before reaching the earth. This prodigality of the body and members of human beings was clearly occasioned by the negligence of the company maintaining the plant. The plaintiff, upon entering the defendant's service, accepted no risk arising from its negligence. He had a right to assume that the company had not set him to toil in the midst of danger. He had a right to assume the road was built with ordinary care and consideration for the safety of the men who were to operate it, and he was not obliged to make any independent investigation for hazards resulting from the disregard of such care. Without actual knowledge of his peril, or a patency so ample as to exclude ignorance, the plaintiff assumed no risk in continuing to work under the conditions surrounding him.

Upon a demurrer to the plaintiff's evidence, every propitious fact it fairly supports is accepted as proved, and every favorable inference which may be fairly deduced must be indulged. So considered, the evidence on behalf of the plaintiff is such that a jury might say he stood acquitted of any knowledge of the jeopardy caused by the particular pole which felled him, and of any culpable carelessness in failing to observe it, and that his conduct at the time of his injury was that of a reasonably prudent man. Other elements essential to a recovery were admittedly established.

Therefore the jury should have been permitted to weigh the testimony, and to approve or condemn the plaintiff's conduct as they saw fit.

The cases of *Rush, Adm.x. v. Missouri Pac. Ry. Co.*, 36 Kan. 129, 12 Pac. 582; *A., T. & S. F. R. Co. v. Schroeder*, 47 Kan. 315, 27 Pac. 965; *Clark v. Missouri Pac. Ry. Co.*, 48 Kan. 654, 29 Pac. 1138; and *Hall v. Wakefield & Stoneham Street Ry.*, 178 Mass. 98, 59 N. E. 668 — relied upon by the defendant in error, — were all decided upon the theory of actual knowledge of his danger by the employee.

The case of *St. Louis Cordage Co. v. Miller* (C. C. A.), 126 Fed. 495, cited to the court since the oral argument, cannot be followed. It collates almost 200 cases, and not one of them from this State. It adopts principles in direct conflict with *St. L., Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266; *A., T. & S. F. R. Co. v. Rowan*, 55 Kan. 270, 39 Pac. 1010; *Railway Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938; *Rouse v. Ledbetter*, 56 Kan. 348, 43 Pac. 249; and numerous other cases decided by this court. Besides, the distinguished judges of the Court of Appeals were themselves divided in opinion as to whether or not the case should have been submitted to the jury — a plain indication that such was the only proper course.

The case of *Glenmont Lumber Co. v. Roy* (C. C. A.), 126 Fed. 524, follows *St. Louis Cordage Co. v. Miller* as an authority. Judge Thayer dissented, as he did in the former case, and, among other things, said:

"At all events, juries should be permitted to find, in such cases as this, whether the servant, with a full knowledge and appreciation of the risk, agreed with his master to assume it and absolve him from liability. This is an inference of fact, and juries should be left to determine it. It is an invasion of the province of the jury to do otherwise."

The legal principles involved in this case were announced last month (January, 1904) in the case of *Buoy v. Clyde Milling Co.* (Kan.), 75 Pac. 466, as they have been time and again since the organization of the court, and, as heretofore in such cases, the judgment of the District Court is reversed, and the cause remanded for further proceedings according to law.

State v. Cain.

(Kansas — Supreme Court.)

BREAKING CAR WINDOWS.—The willful breaking of the window of a street car in use upon a street railway is not a violation of any of the provisions of section 2098, Gen. Stat. 1901.

(Syllabus by the court.)

APPEAL by defendant from conviction of unlawfully injuring a street car.
Decided April 9, 1904. Reported (Kan.), 76 Pac. 443.

Sapp & Wilson, for appellant.

C. C. Coleman, Attorney-General, and *Al. F. Williams*, for the State.

Opinion by GREENE, J.

The appellant was convicted under section 2098, Gen. Stat. 1901, upon an information charging that he did on the 23d day of May, 1903, in the county of Cherokee, State of Kansas, unlawfully, feloniously, and willfully break and injure passenger car No. 31, on the Southwest Missouri Electric Railway Company's tracks, by throwing a stone against and breaking the glass in a window of said car. The Southwest Missouri Electric Railway Company is a street-car company, and car No. 31 was a street car being run on Mineral street, in the city of Galena, when the alleged offense was committed. The section under which the appellant was prosecuted reads as follows:

"Every person who shall willfully cut, break, burn, injure or destroy any locomotive, car, or other machinery which now is or which may hereafter be in use upon any railroad in this State, or any woodhouse, car or water station erected for the accommodation and use of any railroad within this State, shall on conviction thereof be punished by confinement and hard labor in the penitentiary not less than one nor more than three years."

The court instructed the jury, in part, as follows:

"Under the laws of this State, so far as it is applicable to this case, it is enacted as follows: 'Every person who shall willfully break, [or] injure
 • • • any • • • car • • • which now is, or which may here-

after be in use upon any railroad in this State * * * shall on conviction thereof be punished. * * * You are instructed that, as a matter of law, the railroad of the Southwest Missouri Electric Railway Company, described by the evidence in this case, is such a railroad as is mentioned in the statute from which I have just quoted, and that statute is applicable to and is invoked by the charge preferred by the averments of the information in this case."

Appellant contends that a street car is not within the provisions of this section. We have not sought to ascertain when this section was first enacted into the laws of this State, but we find that it is section 105 of the General Statutes of 1868. This was prior to the existence of street railways in Kansas. While this would not of itself be conclusive that street railway cars were not included in this section, we cannot presume that the Legislature intended to protect a class of property which did not exist in the State. The only article of property mentioned which indicates that a street railway car might be included is the word "car," but that word is used in connection with "locomotives," "wood-house," or "water station erected for the accommodation and use of any railroad within this State." This class of property is not the equipment of a street railway. The motive power of the first system of street railways in the State were mules and horses, and street railways have never possessed such equipments as "wood-houses" or "water stations," so that the word "car" was evidently intended to refer to passenger and freight cars used on railroads where locomotives, wood-houses, and water stations are essential in their operation. The Legislature has never treated the term "railroads" as inclusive of street railways. Subdivision 3, art. 3, chap. 18, § 727, Gen. Stat. 1901, in describing the general powers of the mayor and council of cities of the first class, and authorizing such cities to levy and collect a license tax, provides that a license tax may be collected upon all "railroad and railroad companies (including street or horse railroads);" and in subdivision 20, in granting authority to such cities to regulate parks and public grounds, it is provided that they shall have power "to provide for and regulate the construction and passage of railways and street railroads through the streets, avenues, alleys or lanes and public grounds of the city." In section 5955, chap. 84, Gen. Stat. 1901, it is provided: "In any contract for the sale

of railroad or street railway equipment or rolling stock it shall be lawful to agree that the title to the property sold or contracted to be sold * * * shall not vest in the purchaser until the purchase price shall be fully paid." It will be observed that the Legislature thought it necessary to mention street railways specially, indicating that it did not understand the term "railroad" to include street railways. The authorities generally hold that street railways are not included in the word "railroads," and the provisions of the statute of the different States concerning railroads have not been held to include street railways. In *Funk v. St. Paul City Ry. Co.*, 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608, it was said that:

"Laws 1887, chap. 13 (Gen. Stat. 1894, § 2701), provides that every railroad corporation owning and operating a railroad in this State shall be liable for damages sustained by an agent or servant by reason of the negligence of any other agent or servant. Held, that this law is not applicable to a street railway corporation although its line is operated by cable."

In *Manhattan Trust Co. v. Sioux City Cable Ry. Co.* (C. C.), 68 Fed. 82, we find this statement in the syllabus:

"The Iowa statute (McClain's Code, § 2008) making a judgment against any railway corporation for injury to person or property a lien superior to that of mortgages on its property, does not apply to street railway corporations."

In *Louisville & Portland R. Co. v. Louisville City Ry. Co.*, 63 Ky. 175, it was held that

"A provision in a railroad charter that no other railroad should be constructed between two named points in a city cannot be construed as prohibiting the construction of street railways anywhere within the city for the convenience of its inhabitants. In a technical sense, a street railway is not a railroad, and in such contradistinctive sense the term 'railroad' was used in the charter."

In *Lincoln Street R. Co. v. McClellan*, 54 Nebr. 673, 74 N. W. 1074, 69 Am. St. Rep. 736, it is held:

"Section 3, chap. 72, Comp. Stat. 1897, providing that 'every railroad company as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured,' etc., has no application to street railways."

Also in *Bridge Co. et al. v. Iron Co.*, 59 Ohio St. 179, 52 N. E. 192, it is held that

"The statutes of this State relating to railroads are separate and distinct from those relating to street railroads, and the word 'railroad' in section 3208, Rev. Stat., and in section 1 of the act of March 20, 1889 (86 Ohio Laws, p. 120; § 3231-1, Bates' Annot. Stat.), does not include street railroads."

We are firmly convinced that the act charged against appellant was not in violation of any of the terms of the section under which he was charged and convicted. The judgment of the court below is reversed, and the appellant discharged. All the justices concurring.

Diebold v. Kentucky Traction Co.

(Kentucky — Court of Appeals.)

INTERURBAN ELECTRIC RAILWAYS DEEMED TRUNK RAILWAYS.¹—The term "trunk railway" as used in section 164 of the Kentucky Constitution, excepting trunk railways from the provisions thereof, requiring franchises granted by municipalities to be let to the lowest bidder, and limiting the term of such franchises to twenty years, includes an interurban

1. WHAT DEEMED STREET RAILROAD.

1. In general.
2. Application of general railroad law.
3. Underground railroad.
4. Elevated railroad.
5. Interurban railways.
 - a. In general.
 - b. Portion of route constructed on company's own lands.
6. Railroad includes street railroad.

1. In general.—Street railroads are railroads constructed upon streets or highways for the purpose of facilitating the use thereof in the transportation of persons and property. *State v. Dayton Traction Co.*, 18 Ohio Cir. Ct. 490, 10 Ohio C. D. 212; *Nellis Street Surface Railroads*, § 1. It has been held that the designation of "street railways" is to be confined to passenger carriers exclusively. *Carli v. Stillwater St. Ry. Co.*, 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290; *Thomson-Houston Elec. Co. v. Simon*, 20 Oreg. 60, 25 Pac. 147 (holding that street railroads are not carriers of goods except under special circumstances).

electric railway constructed for the purpose of carrying freight and passengers between two cities in different States. The distinction between ordinary street railways operating within cities and electric railways between two or more cities discussed at length.

APPEAL by complainant from a judgment dismissing a bill of injunction against the defendant traction company. Decided December 17, 1903. Reported 25 Ky. Law Rep. 1275, 77 S. W. 674.

C. H. Shield, for appellant.

W. B. Thomas, Helm, Bruce & Helm, D. W. Sanders, and J. G. Sachs, for appellee.

Opinion by **BARKER, J.**

The appellant, John Diebold, is a citizen of Louisville, Ky., and owns real property fronting on Sixteenth street, which is one of the highways of that city. The appellee, the Kentucky Traction Company of Louisville, is a railroad corporation organized under the

But in the absence of statutes circumscribing their powers, street railway companies may carry property and freight as well as passengers. *State v. Dayton Traction Co.*, 18 Ohio Cir. Ct. 490, 10 Ohio C. D. 212. And it has been held that street surface railroad companies organized under general laws providing for their incorporation for the conveyance "of persons and property in cars" for compensation, may operate cars designed and used exclusively for carrying express matter, freight, or property. *De Grauw v. Long Island Elec. Co.*, 43 App. Div. (N. Y.) 502, 80 N. Y. Supp. 163, affirmed, 163 N. Y. 597, 57 N. E. 1108; *People's Rapid Trans. Co. v. Dash*, 125 N. Y. 93, 26 N. E. 25; *Matter of Washington St. Asylum & P. R. R. Co.*, 115 N. Y. 442, 22 N. E. 356. Such purpose is consistent with the purposes for which streets exist, and an abutting property-owner is not entitled to have such use enjoined or declared a nuisance. *Aycock v. San Antonio Brewing Assn.* (Tex. Civ. App.), 63 S. W. 953.

A railroad the rails of which are so laid as to conform to the grade of the street and which is otherwise so constructed that the public is not excluded from any part of the street as a public highway, the cars upon which are propelled at a moderate rate of speed, compared with the speed of traffic railroads at short intervals, carrying only passengers from one part of a thickly populated district to another, in a town or city and its suburbs, stopping at every street crossing to receive and discharge passengers, is a street surface railroad, no matter whether the cars are propelled by animal or mechanical power. *Williams v. City Elec. St. Ry. Co.*, 41 Fed. 556; *Nellis Street Surface Railroads*, p. 1.

general statutes of Kentucky, having power and authority, under its charter, to construct and operate an electric line from Louisville, Ky., to Nashville, Tenn., and to be a common carrier of both passengers and freight, when in operation. As a necessary prerequisite to the building of the proposed line, appellee secured,

2. Application of General Railroad Law.—The General Railroad Act of 1850 (N. Y. Laws 1850, chap. 140), relating generally to the incorporation and operation of railroads, does not apply to street railroads. In re New York Dist. R. Co., 107 N. Y. 42, 14 N. E. 187.

In Ohio it is held that statutes relating to railroads are separate and distinct from those relating to street railroads. *Massillon Bridge Co. v. Iron Co.*, 59 Ohio St. 179, 52 N. E. 192. Steam railroad companies and electric railway companies are classified as separate and distinct from each other by the statutes of Ohio; and statutes regulating the former are inapplicable to the latter unless an intention to the contrary clearly appears. *Dayton & Union Ry. Co. v. Dayton & Muncie Traction Co.*, 26 Ohio Cir. Ct. 1.

3. Underground railroad.—A railroad confined within the limits of a city, and proposed to be built exclusively under the surface of a street, is a street railway within the meaning of the provisions of the New York State Constitution (art. 3, § 16), declaring that no law shall authorize the construction of a street railroad except upon the condition of the consent of the owners of one-half in value of the property bounded on the street. In re New York Dist. R. Co., 107 N. Y. 42, 14 N. E. 187. In this case Finch, J., said: "Such a road is to be deemed a street railway, not only because it subserves street purposes and reaps the benefit of street easements, and occupies and modifies the street surface, but also because it is fully within the mischiefs which the constitutional provision was designed to redress and prevent. * * * Street railways may occupy every street in a city and iron the whole surface, or spin their webs in the air over every avenue, or undermine the entire system of city streets. To authorize such is to inflict injury upon adjoining lot-owners, in greater or less degree, and hence the consent of a due proportion of these was required by the Constitution, or, instead, the order of selected commissioners confirmed by the court. Where the railway runs under the streets, the adjoining owners are as much and as dangerously affected as where it runs on their surface or above them. Whether the new surface is safe and sufficient, or weak and perilous, and invites or frightens away passage; whether his vaults and foundations will remain safe and secure, or be undermined, or weakened by vibration; all these are to him questions of vital importance, affecting his comfort and convenience, the success of his business, and the value of his property. The same reasons which dictated a constitutional protection against roads on or above the surface of the streets apply to those which are built beneath in the manner here contemplated, and these should justly be deemed street railroads within the meaning of that phrase as used in the Constitution."

from the general council of the city of Louisville, an ordinance granting to it a right of way from a point on its southern boundary, along and over parts of certain named streets and alleys, to Center and Jefferson streets. One of the highways over which the franchise granted by the municipality extends is that part of

4. **Elevated railroad.**—An elevated railroad erected in a city street used exclusively for the transportation of passengers is a street railway, and within the meaning of that term as used in an act authorizing the incorporation of a street railroad company. *Commonwealth v. Northeastern El. R. Co.*, 3 Pa. Dist. R. 104. But a street surface railroad company incorporated as such cannot construct an elevated railroad. *Commonwealth v. Northeastern El. R. Co.*, 161 Pa. St. 409, 29 Atl. 112.

5. **Interurban railways.** a. **In general.**—A local passenger railroad built along a turnpike outside the city limits, under a contract purchasing the privilege from the turnpike company, and for which no street franchise of any kind has been conferred by the city, does not, upon the extension of the city limits to include a portion of the road, become "a street railway" within the Maryland laws, imposing a tax upon the gross receipts from all street railways within the city limits. *Baltimore v. B. C. & E. M. Pass. R. Co.*, 84 Md. 1, 35 Atl. 17, 33 L. R. A. 503.

b. **Portion of route constructed on company's own lands.**—In the case of *Matter of Syracuse v. South Bay Ry. Co.*, 33 Misc. Rep. (N. Y.) 510, 68 N. Y. Supp. 881, it was held that a corporation organized under the provisions of the New York Railroad Law relating to the incorporation of street surface railroads was a street surface railroad company within the meaning of the New York State Constitution (§ 18, of art. 3), which forbids a street railroad company from building its line across or upon a highway unless it first obtains the consent of the local authorities having control of that portion of the highway where it is proposed to construct the crossing, notwithstanding the fact that such railroad is constructed for the most part upon the company's own property. In discussing this question the court said: "The argument of the petitioner is substantially that when the constitutional provision as to street railroads was adopted in 1874, these roads were constructed for short distances and entirely within the bounds of highways. Since that time, however, the use of street surface railroads has been vastly extended and they practically serve the purpose of, and are built in the same manner as, steam railroads, the only distinction being as to the motive power used. Their lines have been lengthened and they carry passengers and freight between towns situated a considerable distance apart. Further than this the practice has been, to a large extent, to avoid the occupation of highways, except where it is necessary to cross them, and to construct the road upon the private right of way in the same manner that a steam railroad is constructed. The policy, therefore, it is said, which dictated the constitutional provision, does not apply when a crossing merely is desired. Such a crossing is certainly no greater

Sixteenth street upon which appellant's property fronts. Conceiving that the franchise granted to appellee was void, as being violative of the provisions of section 164 of the Constitution, which requires that all franchises included within its language be sold to

obstruction in the case of electric surface railroads than in the case of a steam railroad, and the authority given to the Supreme Court in the latter case should be held to apply in the former. All this may be so, but it is an argument to be directed rather to the people or the Legislature than to the courts. The original distinction made between steam and surface street railroads seems to have rested largely upon the fact that the latter were local in their character, and their location could safely be left to the local authorities. Steam railroads involved larger interests and the convenience of the public in larger districts was affected. It was thought wise, therefore, that the courts should exercise some control over merely local opposition. It may be true, as is stated, that this distinction no longer exists. Still the constitutional provision is too clear and explicit to be evaded. The petitioner chose for its own purposes to organize under and take the benefits of the Street Surface Railroad Law. It should not be heard to complain that it is deprived of certain powers it would have acquired had it complied with the more onerous conditions of the General Railroad Act. It is also suggested that the petitioner is not 'a street railroad' within the meaning of the Constitution, because it is not constructed for its whole length upon a public highway. I cannot assent to this suggestion. Its articles of incorporation state that it is a street surface railroad corporation, and that it intends to build a street surface railroad. What the framers of the Constitution had in mind was such a road as distinguished from the well-known steam railways then in use. That it chooses to pass for a portion of its route over its own property makes it no less a street railway, otherwise if it is not a street railway in one town, where it does not use the highway, it is not a street railway in another town, where it avowedly passes along the public highway. If not in the one case, then not in the other, does it require either public or private consents. As a whole it is a 'street railway' or it is not. If not, the Constitution may be easily evaded."

In the case of *Hanna v. Metropolitan St. Ry. Co.*, 81 Mo. App. 78, it was held that a railroad constructed in the country without regard to highways, for a considerable distance, for transporting persons from one city to another, is rural rather than urban, though it confine its business to carrying passengers only, and is operated by a street railroad company.

An interurban and electric railroad is classed as a street railroad under the statutes of Ohio. *Cincinnati, L. & A. Elec. St. Ry. Co. v. Lohe*, 68 Ohio St. 101, 67 N. E. 161.

6. Railroad includes street railroad.—The words "railway" and "railroad" are used indiscriminately in statutes and are generally considered as synonymous; either will be held to apply to a street surface railroad unless there

the highest bidder, appellant instituted this action for an injunction to prohibit the building of the proposed line along Sixteenth street in front of his property.

The pleading in this case aptly raises the one question involved

appears from the title of the act, its purpose, or its context, something to indicate that such a railroad is not included. *City of Philadelphia v. Philadelphia Tract. Co.*, 1 St. Ry. Rep. 717, 206 Pa. St. 35, 55 Atl. 762 (citing *Old Colony Trust Co. v. Rapid Trans. Co.*, 192 Pa. St. 596, 44 Atl. 319; *Gyger v. Philadelphia City Pass Ry. Co.*, 136 Pa. St. 96; *Hestonville, etc., R. Co. v. Philadelphia*, 89 Pa. St. 210).

Whether a statute relating generally to railroads is applicable to a street railroad must, however, be determined by the context thereof, and its purpose and intent. For instance, a statute requiring all trains to stop within 100 feet of the intersection of two railroads was held to apply to a street railroad operated in a highway. *Birmingham Mineral R. Co. v. Jacobs*, 92 Ala. 200, 9 So. 320; *Katzenberger v. Lawo*, 90 Tenn. 235, 16 S. W. 611. A statute authorizing the consolidation of railroads includes street railroads. *In re Washington St., etc.*, R. Co., 115 N. Y. 442, 22 N. E. 356. Compare *Gyger v. Philadelphia, etc.*, R. Co., 136 Pa. St. 96. An act making the real estate of "any railroad company" subject to certain statutes applies to street railroads. *Citizens' Pass. Ry. Co. v. Pittsburgh*, 104 Pa. St. 522. A statute which provided that any corporation created by the State, "except railroad and banking corporations," might institute proceedings in insolvency, was held to embrace street railway corporations within the exception. *Central Nat. Bank v. Worcester H. R. Co.*, 13 Allen (Mass.), 105.

But in the case of *Railroad Comrs. v. Market St. Ry. Co.* (Cal.), 65 Pac. 1065, it was held that street railroad companies are not railroad or transportation companies within the meaning of a constitutional provision (Cal. Const., art. 12, § 22), defining the judgment and jurisdiction of the railroad commission, and authorizing it to establish rates of charges for the transportation of passengers and freight by railroad and other transportation companies. The court said: "In the ordinary acceptance of the term 'railroad company,' or 'railroad,' it is not understood to mean a street railway engaged in the business of carrying passengers the entire distance, or any part of the distance, over which the road runs, for one and the same fare."

In Ohio, suburban and interurban railroads are classified by statute with street railroads (Ohio Rev. Stats., § 2780-17). They are, therefore, governed by the laws relating to street railroads. *Cincinnati, etc., St. Ry. Co. v. Cincinnati H. & I. R. Co.*, 12 Ohio C. D. 113.

in the record, whether or not the proposed road is a trunk railroad within the meaning of section 164. If it is, appellant has no cause of action; if it is not, the injunction prayed for should have been awarded. Trunk railroads are specifically excepted from the provisions of section 164. The opinion of the learned chancellor below fully meets our views upon the question for adjudication, and it is adopted as the opinion of the court, and is as follows: To decide the questions of law which arise on this motion, two sections of the Constitution of Kentucky have to be considered, to wit, sections 163 and 164. Section 163 is as follows:

"No street railway, gas, water, steam heating, telephone or electric light company within a city or town shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus, along, over or across the streets, alleys or public grounds of a city or town without the consent of the proper legislative bodies or boards of such cities or towns being first obtained; but when charters have been heretofore granted conferring such rights and work in good faith been begun thereunder, the provisions of this section shall not apply." Section 164: "No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege or make any contract in reference thereto for a term exceeding twenty years. Before granting such franchise or privilege for a term of years such municipality shall first after due advertisement receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway."

The question to be decided sharply on this motion is whether the appellee, having its termini in Louisville and Nashville, under its original and amended charter, is a street railway, and, therefore, within the constitutional prohibition against such a grant as that contained in the ordinance referred to, or a trunk railway, and thereby expressly excluded by section 164 from the prohibitory operation of the two sections of the State Constitution above quoted. Whether a railway is a street railway or a trunk railway, it will not be contended, we apprehend, depends on the motor power employed by it in propelling its rolling stock over and along its tracks. It certainly can make no difference whether the cars of a railroad company are propelled by the agency of steam, or of gasoline, or of electricity, compressed air, liquified air, or any other agency which science and the inventive genius of man may in the future bring into use. Rather the character of a railroad

company is determined by the nature and extent and limits put upon its operation by law or otherwise, and by the character and object of its corporate creation as shown by its charter. By the original charter of the Louisville & Nashville railroad, it was authorized and empowered to lay its tracks and propel its cars thereon between Louisville and Nashville, and was authorized and empowered, just as the appellee in this case is authorized and empowered, to transport passengers, freight, and express matter to all immediate points, towns, cities, and counties between Louisville and Nashville, and to erect its depots to accomplish its corporate purposes, just as the appellee here is authorized and empowered to do. The only difference in character, legal or otherwise, between the appellee and the Louisville & Nashville railroad, under its charter, is that one has steam for a motor power, and the other has electricity; both are interurban and interstate railroad corporations. It is difficult to understand what the phrase "a trunk railway" clearly means, if it does not mean an interurban and an interstate railway for commercial purposes.

Appellant insists that appellee is a street railway within the meaning of section 163 of the State Constitution, above quoted. It will be observed at a glance that the framers of section 163 of the State Constitution intended that the restricted character of the street railway, as a strictly local intramural street-car company, should be understood as such by the classification and association of the street railway referred to in that section with gas companies, water companies, steam heating companies, telephone companies, and electric-light companies, all of which are strictly intramural, and essentially and exclusively local in their scope and operation in cities, towns, and other municipalities. The fact that a railroad company, whether operated by electricity or steam, such as the Chesapeake & Ohio Railroad Company, Illinois Central Railroad Company, the Louisville & Nashville Railroad Company, or an interurban or interstate railroad company, all having the same corporate purposes, and performing the same important public functions for the convenience and good of the public, in transporting passengers, freight, and express matter, for the advancement of commerce between towns and cities within a State, or between towns and cities within different States, is obliged, in

order to accomplish the corporate purposes of its creation, to have terminal points, as passenger or freight depots, to reach which it is necessary to lay its tracks along the streets within a city or town, does not make such railroad company a street railway, and impress upon it a local, intramural character, such as is possessed by gas, water, steam-heating, and electric-light companies, enumerated in section 163 of the State Constitution, above quoted. If a railroad company, whether operated by steam or electricity as a motor power, which lays its tracks and connects in commercial relationship different towns, cities, counties, and other municipalities within a State, or cities of different States, be not a trunk railway, then it is difficult to understand what a trunk railway is. We have examined all the recognized authorities upon railroads and railways, and have been unable to find, in any text-book or decision, the phrase "trunk railway," or anything that approaches the same. In *Elizabeth & Big Sandy R. Co. v. Ashland, etc., Street Ry. Co.*, 96 Ky. 355, 26 S. W. 181, the court said: "It is urged, however, that the appellee [the street railway company] is not a railroad company in the meaning of the section of the Constitution quoted. We think, whatever may be said of street railways in general, that the charter of this company puts it in the class indicated by that section. The railway was to connect two cities. It might use steam, horse, or other propelling power on said road in the transportation of freight and passengers."

In the case under consideration, the appellee was organized under the general railroad laws of this State, just as a railroad corporation extending its line from the city of Louisville to any distant point in the State of Kentucky, or to any city or point in a distant State (assuming that the foreign States accorded the right or privilege to the Kentucky corporation in or across their territory), would have to be organized. And unless the agency of propulsion adopted by a railroad determines its legal character as a street railway or a railroad trunk line, it is impossible to conceive of any distinction between the two. It seems to us that it is the charter of a company which places it in the class to which it belongs, whether street railway or trunk railway, and not the character of the motor power which it employs. If, in order to be a trunk railway, the railroad company must have a main line,

with branches or feeders branching off from the main stem to adjacent towns, cities, or counties, then the record in this case shows that the defendant electric railroad corporation meets this requirement, because it has branches to Owensboro, Russelville, and other points off from its main line between Louisville and Nashville. We think there can be no doubt that, giving the phrase "a trunk railway" a rational interpretation, it means, and can mean nothing else but a commercial railway or railroad connecting different cities within a State, and facilitating commerce between them, or between cities in different States. And to such commercial railroads, of course, it is not pretended that section 163 of the State Constitution applies. The term "street railway," as used in section 163 of the State Constitution, means, and can only mean, applying to it a common-sense interpretation, those street railroads which, before the introduction of electricity, used mules and horses as motor power for drawing the street cars over its street-car tracks, for the use and convenience of the local public in a municipality — those street cars that run along the streets of a city, picking up passengers here and there, and putting them off at street crossings, and at the termini of the street-car companies' tracks within the municipality. They were created and organized and operated, and such was their character, as defined in their charters, strictly and exclusively for the local convenience of those persons or passengers whose pleasure or business prompted them to go from point to point within the city. They were never organized or intended for commercial purposes between different cities within a State, or between different cities in different States. In the case of *Louisville & Portland R. Co. v. Louisville City Ry. Co.*, 2 Duv. 175, Judge Robertson, after holding that the amended charter of a railroad company was as efficient in establishing its charter as its original charter, said:

"A railroad is for the use of the universal public in the transportation of all persons, baggage, and other freight. A street railway is dedicated to the more limited use of the local public for the more transient transportation of persons only, and within the limits of the city. In the technical sense, therefore, a street railway is not a railroad. And we presume that, in this contra-distinctive sense, the term 'railroad' was used in the appellant's charter, as amended in 1860. A railroad and a street railroad are, in both their technical and popular import, as distinct and different as a road and a

street, or as a bridge and a railroad bridge, and it has been adjudged that the simple term 'bridge' means a viaduct in a road dedicated to common use, and that the qualified phrase 'railroad bridge' means a viaduct constructed for the exclusive use of railroad transportation."

Lewis, in his work on Eminent Domain, vol. 1, § 110a, says:

"Railroads now exist in great variety as regards motors and motive power, the size and style of cars and coaches, and the methods of operating and construction. It is probable that these variations will be multiplied in the coming years. It is doubtful whether any permanent and satisfactory classification can now be made. There has been a general concurrence, however, in embracing all railroads in two divisions or classes: (1) Commercial railroads; (2) street railroads. Commercial railroads embrace all railroads for general freight and passenger traffic between one town and another, or between one place and another. They are usually not constructed upon the public streets or highways, except for short distances. Street railroads embrace all such as are constructed and are operated in the public streets, for the purpose of conveying passengers, with their ordinary hand luggage, from one point to another on the street."

In the case of *Zehren v. Milwaukee Electric Ry. Co.*, 99 Wis. 83, 74 N. W. 538, 67 Am. St. Rep. 850, 41 L. R. A. 575, the court said:

"A street railway in its inception is a purely urban institution. It is intended to facilitate travel in and about the city from one part of the municipality to another, and thus relieve the sidewalk of foot passengers and the roadway of vehicles. It is thus an aid to the exercise of the easement of passage; strictly a city conveyance, for the use of the city, by people living or stopping therein, and fully under the control of the municipal authorities, who have been endowed with ample power for that purpose. This strictly urban character of a street railway remained practically unchanged for many years, and during these years the long line of decisions grew up recognizing the street railway as merely an improved method of improving the street, and rather as a help to the street than as a burden thereon."

The learned court, after speaking of the introduction of the new motor power, and the enlargement of street cars, and the extension of distances, for their operation, even connecting separated cities and villages, said:

"Thus the urban railway has developed into the interurban railway, and threatens soon to develop [as in the case at bar] into the interstate railway. The small car which took up passengers at one corner and dropped them at

another has become a large coach, approximating the ordinary railway coach in size, and has become a part, perhaps, of a train which sweeps across the country, from one city to another, bearing its load of passengers, ticketed through with an occasional passenger picked up on the highways. The purely city purposes which the urban railway subserves have developed into and are being supplanted by an entirely different purpose, namely, the transportation of passengers from city to city, over long distances and stretches of intervening country. It is built and operated mainly to obtain through travel from city to city, and only incidentally to pick up a passenger in the country towns. This through travel is unquestionably composed of people who otherwise would travel on the ordinary steam road, and would not use the highway at all."

In the case of *Street Ry. Co. v. Doyle*, 88 Tenn. 747, 13 S. W. 936, 9 L. R. A. 100, 17 Am. St. Rep. 933, that distinguished and learned jurist, Judge Lurton, said:

"The distinction between the use of the commercial railway and that by a horse railway is so wide and plain that it needs no further comment or illustration. Confessedly, the railway involved in this case [which was an electric railway] is on a line between the two, the equivalent of neither, but partaking largely of the nature of both."

The electric railway, in the case Judge Lurton decided, transported passengers only, and this feature Judge Lurton lays emphasis on as distinguishing it from a commercial railway, which carries both passengers and freight, receiving and discharging the same at regular depots or stations established for that purpose.

In the case of *Marlott v. Collinsville, C. E. Electric Ry. Co.*, 108 Fed. 313, 47 C. C. A. 345, Judge Grosscup said:

"It [referring to the Collinsville Electric Railway Company] was incorporated under the law of March 1, 1872 [Laws 1871-72, p. 625], relating to the incorporating of railroad companies. Its articles of incorporation are on file in the office of the secretary of state of Illinois, in the Book of Railroad Records. It took, and unquestionably intended to take, under its charter, the powers of a railroad corporation, and among them the railroad corporation right of eminent domain. The fact that its trains are to be operated by electricity, instead of steam, does not affect its place in the laws of the State as a railroad company. There is nothing in the acts of 1872 [Laws 1871-72, p. 625] and 1889 [Laws 1889, p. 223] that restricts railroads therein mentioned to the use of steam as a motive power, or prevents existing steam roads from changing their motive power to that of electricity. There is nothing in these acts that necessarily or fairly excludes its application to electrical roads as they now exist; indeed, these

electrical roads, in the speed of their trains, in the distance traveled, and in their capabilities for transportation, are well within the field of public utilities hitherto occupied by the steam railroads alone. We cannot conceive that these acts, so far, at least, as they are reasonably applicable, were not meant to cover every form of railroad that, in the march of events, answers the purpose of general transportation; nor do their incidental functions as street railways, in the towns or cities traveled, lift them out of the railroad statute, for it has been held that an elevated road, while intramural in its creation and in its powers, is within the contemplation of the railroad statute, and exercises its right of eminent domain by virtue of these statutes. *Lieberman v. Railroad Co.*, 141 Ill. 140, 30 N. E. 544. Indeed, if appellee be not a railroad within the meaning of the act of March 1, 1872, as modified by the act of May 27, 1889, and other acts relating thereto, we can find no authority for its existence as a corporation, or for its exercise of the right of eminent domain. See also, to the same effect, the very interesting and instructing case of *Mass. Loan & Trust Co. v. Hamilton*, 88 Fed. 589, 32 C. C. A. 46; *Williams v. City Electric Street Ry. Co.* (C. C.), 41 Fed. 156; *Chicago R. Co. v. Milwaukee R. Co.* (Wis.), 70 N. W. 678, 37 L. R. A. 856, 60 Am. St. Rep. 136, 813."

The foregoing authorities conclusively demonstrate that the defendant electric corporation is not a street railway within the meaning of sections 163 and 164 of the present Constitution of Kentucky, but that it is an interurban and interstate commercial railroad, with all the incidental corporate rights and powers of railroad corporations in this State, whether operated by steam or electricity or any other motive power. For a very thorough examination of the authorities, both text-writers and decisions on railroads or railways, while the court has been unable to find a legal definition of the phrase "trunk railway" formulated in any precise words, it is believed that the following is the correct definition of the phrase:

"A trunk railway is a commercial railway, whose main line, whether operated by steam, electricity, or any other motive power, connects towns, cities, counties, or other points within the State or in different States, and which railroad company, under its charter, or under the general law, has the legal capacity of constructing, purchasing, and operating branch lines or feeders connecting with its main stem or trunk, the main or trunk line bearing the same relation to its branches that the trunk of a tree bears to its branches, or the main stream of a river bears to its tributaries."

Under section 842a, Ky. Stat. 1903, it is provided that an interurban electric railroad company, in order to be under the same

responsibilities, and to have the same rights, powers, and privileges as railroad corporations existing under the laws of this Commonwealth, must, under its charter, be authorized to construct a railroad ten or more miles in length. The statutory requisite must, of necessity, be incorporated into the above definition of a trunk railway when applied to interurban electric railroad companies in this State. No reason can be suggested, and none in fact exists, why the phrase "trunk railway," found in section 164 of the State Constitution, should be applied to steam railroad corporations, and not to electric railroad corporations, or to electric railroad companies, interurban or interstate. Manifestly, it is equally applicable to both. The phrases "trunk railway" and "main line," whether applied to steam railroad corporations or electric railroad corporations, are essentially synonymous, else both phrases are without meaning. It is a misconception of the general statutory railroad law of this State, as embodied in article 5, chapter 32, Kentucky Statutes, to suppose that the grant or regulation contained in the ordinance of the city, defining the streets along and over which the defendant company is authorized to run in order to reach its terminal depot at Green and Center streets of the city of Louisville, is a grant of a franchise or privilege to a street railway, which would be void unless duly advertised for public bids, and accordingly awarded to the highest and best bidder.

The defendant interurban electric railway company was created and organized, as we have seen, under the general statutory railroad laws of this State contained in article 5, chapter 32, of the Kentucky Statutes. It derives its corporate franchises, rights, and powers from the State of Kentucky. It does not, and cannot, derive any of its corporate rights, franchises, and powers from the city of Louisville. By subsection 5 of section 768 of article 5 of the Kentucky Statutes, it is provided that all railroad companies created under that act shall, among other things, have the power to construct its road upon or across any watercourse, private or plank road, highway, street, lane or alley, and across any railroad or canal; and, in case the road is constructed upon any street or alley, the same shall be upon such terms and conditions as shall be agreed upon between the corporation and the authorities of any

city in which the same may be. Thus it will be seen that the right of the defendant company to lay its tracks along the streets of the city of Louisville is granted by the Legislature of Kentucky, subject only to the provision — a most reasonable one — that the city shall have the power of regulating the mode or manner in which the defendant railroad corporation may or shall exercise its corporate franchises, privilege, and right of constructing its road upon and along the streets of the city. The city of Louisville has exercised its supervisory power over the mode or manner in which the defendant railroad corporation should exercise its statutory corporate franchise of constructing its road upon and along the public streets of the city, by defining and prescribing the streets and the route along which the defendant may construct its railroad. This is all the city has done in the ordinance. It has granted to the defendant no franchise or privilege which it did not already possess under subsection 5, section 768, article 5, chapter 32, Kentucky Statutes. The city of Louisville, by said ordinance, has simply exercised its power of regulating the mode and manner in which the defendant corporation may exercise its franchise, derived from the State, of entering with its tracks within the limits of the city, and laying the same along the public streets, in order to reach its terminal depot in the city.

The judgment is affirmed.

Thiel v. South Covington & Cincinnati Street Railway Co.

(Kentucky — Court of Appeals.)

COLLISION WITH VEHICLE DRAWN BY HORSE WHICH WAS RUNNING AWAY; DUTY OF MOTORMAN TO STOP CAR.¹—The plaintiff was injured by being thrown from a wagon which was struck by one of the defendant's cars. The horse drawing the wagon was running away, and the driver was attempting to control him. The space between the horse and the car when the horse first turned upon the track was at least 300 feet. When

1. As to duty of motorman to stop car when he observes horses unmanageable from fright upon or close to the track, see note to *Lincoln Traction Co. v. Moore*, *post*, p. 642.

within about 100 feet of the car the driver waved his hand as if to notify the motorman to stop the car. As the horse approached the car it turned, but in so doing was struck by the car, and the plaintiff was thrown from the wagon and seriously injured. It appeared that at the rate at which the car was going it could have been stopped within six or eight feet. Under such circumstances it was held that the court erred in giving a peremptory instruction to find for the defendant; that under the facts as they appeared the jury might have found that the motorman was negligent in not stopping the car before the collision.

APPEAL by plaintiff from judgment for defendant. Decided January 29, 1904. Reported 25 Ky. Law Rep. 1590, 78 S. W. 206.

B. F. Graziani, for appellant.

Ernst, Cassatt & McDougall, for appellee.

Opinion by PAYNTER, J.

The appellant instituted this action to recover damages for injuries which he received by reason of the alleged negligence of the servants of appellee in causing one of its street cars to collide with a wagon which appellant was driving. It is, in substance, averred in the petition, that while a party riding in the wagon with appellant was paying the toll at the Cincinnati end of the suspension bridge which crosses the Ohio river between Cincinnati, Ohio, and Covington, Ky., a street car, by reason of the negligence of those in charge of it, struck a wagon, causing the horse to take fright and run away over the bridge toward the Covington end of it; that as the horse approached that end of the bridge those in charge of the car which was going to the Cincinnati side from Covington, by reason of their negligence, caused it to strike the wagon, and threw appellant from it, to his serious injury and damage. The evidence introduced by the plaintiff failed to show that the car which first struck the wagon on the Cincinnati end of the bridge belonged to the appellee. The evidence of the plaintiff himself is very unintelligible and unsatisfactory, evidently resulting from his lack of intelligence and the faculty of describing an occurrence like the one in question. A witness by the name of Besten, introduced by the appellant, gives a very intelligent account of the collision. Preliminary to the statement of this

witness' testimony it is well to state that the bridge is higher in the middle than elsewhere; that there are two car tracks over the bridge; that the west track is used by cars running from Cincinnati to Covington, and the east track is used for cars going from Covington to Cincinnati. Besten testified, in substance, that the horse which appellant was driving was running away, and that the driver was endeavoring to control him; that as the horse approached the Covington side a street car came upon the bridge from Covington; that the horse was running on the east track; that the car was running on the same track; that the space between the horse and the street car was about 300 feet; that the horse continued to run on the east track until it got just in front of the street car, when the horse swung from the track, and before the wagon could leave it the car ran into the wagon, and threw therefrom the occupants. The plaintiff survived his injuries, but his companion was killed. The street car did not stop until after the collision, and apparently made no effort to do so until that time. Besten testified that within about 100 feet of the street car the appellant waved his hands, as if to notify the motorman to stop the car. The evidence is that the car could have stopped, at the rate at which it was going, within the distance of six or eight feet. Under this state of facts the court gave peremptory instructions to find for the defendant.

A jury would have been authorized to conclude that when the horse turned from the track to avoid the street car the wagon would not have struck it if the car had been stopped. The question arises, should the car have been stopped, under the circumstances, before the horse reached it. There would have been no trouble in stopping the car before the horse reached it, even after the driver gave the signal to have it stop. Even if there had been no obligation on those in charge of the street car to have discovered the appellant upon the track and avoided injuring him, still, if the discovery was made that he was upon the track in a perilous position, and might be saved by stopping the car, it was the duty of those in charge of it to do so, and thus have avoided injuring him. From the circumstances proven in this case, a jury might have felt authorized to infer that those in charge of the street car discovered the appellant's perilous position on the track and used no care

to avoid injuring him. Street cars are almost as dangerous agencies in the destruction of human life as railroad trains. They are operated upon streets upon which people are constantly traveling. People may be expected to cross the track at any point on the line. Street cars have not the exclusive right to the use of the streets. In view of the fact that persons may be expected to be upon the street-car track at any time or place, the law imposes a duty upon motormen to use ordinary care to discover persons upon the track and avoid injuring them. In *Passamaneck's Admr. v. The Louisville Ry. Co.*, 98 Ky. 205, 32 S. W. 623, the court said:

"Persons operating street cars along the public streets of a city must know, and in law are bound to know, that men, women, and children have an equal right to the use of the highway, and will be upon it. It was the duty of appellee's servant or agent to be on the lookout, and to take all reasonable measures to avoid injuries to persons who might be upon the street. To be on the watch is no more than ordinary care under such circumstances."

The court erred in giving a peremptory instruction to find for defendant.

The judgment is reversed for proceedings consistent with this opinion.

Louisville Railway Co. v. Teekin.

(Kentucky — Court of Appeals.)

PUNITIVE DAMAGES.—Punitive damages may be awarded in a case where the plaintiff was injured by an electric car being run at a high rate of speed in a narrow street after dark, and where it appeared that the car gong was not sounded at a street crossing near which the accident occurred.

APPEAL by defendant from judgment for plaintiff. Decided February 9, 1904. Reported 25 Ky. Law Rep. 1692, 78 S. W. 470.

Farleigh, Straus & Farleigh, for appellant.

Chatterson & Blitz, for appellee.

Opinion by O'REAR, J.

The decisive question in this case is whether an instruction allowing punitive damages should have been given. Appellee was

driving his delivery wagon over one of the streets of Louisville after dark, about 8 o'clock at night. The street was so narrow that appellant's double-track street railway took up the most of it. Appellee's wagon was being driven on one of the tracks, when, being warned by a car coming up in his rear, he drew off to the other track (there being not enough room to the side of the track next to the curbing), when another car, coming in the opposite direction, struck his horse, killing it, demolishing the wagon, and injuring appellee. This last-named car, according to the evidence for appellee, was being run at a high rate of speed — from twelve to twenty miles an hour. It failed to sound its gong at the street crossing near which the accident occurred. The motorman was looking back, and not ahead. We are of opinion that this evidence was enough to base an instruction on for punitive damages, allowable for gross neglect.

Judgment affirmed, with damages.

Monehan v. South Covington & Cincinnati Street Railway Co.

(Kentucky — Court of Appeals.)

1. INJURY TO CHILD RIDING ON STREET-CAR STEP; DUTY AS TO TRESPASSER.¹—

The plaintiff, a child between the ages of six and seven years, was riding upon the step of the rear platform of one of the defendant's cars outside of a rail erected on one side of the platform to prevent ingress and egress to and from the car upon that side. He was thrown off by the jolting of the car and injured. It was held that, notwithstanding the fact that the child was of such an age as not

1. Injury to children unlawfully riding on cars.— See *Aiken v. Holyoke St. Ry. Co.*, 2 St. Ry. Rep. 416, 184 Mass. 269, 68 N. E. 238; *Albert v. Boston Elev. Ry. Co.*, 2 St. Ry. Rep. 448 (Mass.), 70 N. E. 52; *Indianapolis St. Ry. Co. v. Hockett*, 1 St. Ry. Rep. 115, 161 Ind. 196, 67 N. E. 106.

A boy who hangs upon the outside of a street car cannot be deemed a passenger, although he has a nickel in his pocket with which he intends to pay his fare when called upon, where the crowd on the car prevents the employees from observing him. *Udell v. Citizens' St. R. Co.*, 152 Ind. 507, 52 N. E. 799.

While it is the duty of a street railway company to prevent children from entering or leaving the cars except under proper safeguards (*New Jersey*

to be guilty of contributory negligence, he was a trespasser to whom those in charge of the car did not owe the duty of discovering his peril.

2. EVIDENCE AS TO CUSTOM OF CHILDREN TO RIDE ON STEPS OF CAR.—It is proper to exclude testimony that in a thickly settled portion of the city many children congregated thereabouts and had theretofore often trespassed upon the defendant's cars with the knowledge of the employees in charge thereof.

APPEAL by plaintiff from judgment for defendant. Decided March 3, 1904.
Reported 25 Ky. Law Rep. 1920, 78 S. W. 1106.

C. L. Raison, Jr., Geo. H. Ahling, and A. M. Caldwell, for appellant.

L. J. Crawford, for appellee.

Opinion by BARKER, J.

The appellee is a corporation operating an electric railway over the streets of the city of Newport, Ky. The appellant, at the time of the injury of which he complains, was between six and seven years of age. At the intersection of Eleventh and Patterson streets, in the city named, one of appellee's cars had stopped

Traction Co. v. Danbech, 57 N. J. L. 463, 31 Atl. 1038), such duty depends upon the circumstances; for instance, a company would not be liable for an injury to a boy of ten years of age, while he was attempting to get off the front platform of a car on which he was stealing a ride, and from which he had been repeatedly warned, and put off by the driver, where there is no reliable evidence that the driver knew he was on the car when the accident occurred (*Wrasse v. Citizens' Traction Co.*, 146 Pa. St. 417, 23 Atl. 345); nor for an injury to a child, who was a mere trespasser, caused by falling from a car, when his presence there was unknown to the driver. *Clutzbeher v. Union Pass. Ry. Co. (Pa.)*, 1 Atl. 597.

Employees of a street railroad company are under no obligation to keep a lookout to prevent boys endeavoring to ride without permission, from entering its cars while in motion, and owe them no duty save not to injure them wantonly. *Little Rock T. & E. Co. v. Nelson*, 66 Ark. 494, 52 S. W. 7. Nor is a company liable for an injury to a boy eleven years old, who, for the purpose of stealing a ride, boards the car and secretes himself so as to avoid detection, unless his presence is actually known, and assented to by the driver or conductor; and such consent cannot be implied by the mere fact that the driver observed him and did not demand any fare, where it was the duty of the conductor and not the driver to collect fares. *Wynn v. Havana City & S. R. Co.*, 91 Ga. 344, 17 N. E. 649. In the case last cited it was held,

for the purpose of receiving and discharging passengers. On the rear platform of the car were steps, so arranged that passengers could get on or off from either side; but appellee only permitted this to be done on one side at a time, and, for the purpose of preventing ingress and egress to and from the car on more than one side, it had a small iron wicket gate across the side not in use. This was movable, so that it could be transferred from one side to the other, as the necessities of the case required. Appellant, and a companion about the same age, while the car was standing at the intersection mentioned, got upon the lower step of the side of the rear platform which was not being used for the purpose of taking on or letting off passengers, and, taking hold of the iron gate with their hands, stood on the step until the car started. The car seems to have soon attained a rapid rate of speed, and appellant was jolted off, falling into the street, and receiving injuries about the head, to recover damages for which this action was instituted. Upon the trial of the case, after the close of appellant's (plaintiff's) testimony, the court, on motion, awarded appellee (defendant) a peremptory instruction to the jury to find for it, which was done; and of this, appellant is here complaining.

however, that it would be negligence upon the part of a carrier to allow a young child trespassing upon a car to ride upon the steps of the front or rear platform when his dangerous position was actually known, or when the circumstances were such as to make the failure to know his peril palpable neglect and inattention to duty on the part of those in charge of the car. See also *Jackson v. St. Paul City R. Co.*, 74 Minn. 48, 76 N. W. 956; *Levin v. Second Ave. Traction Co.*, 201 Pa. St. 58, 50 Atl. 225; *Barre v. Railway Co.*, 155 Pa. St. 170, 26 Atl. 99.

Child riding upon invitation of employee.—Where it appears that a boy is permitted to ride upon a street car, either upon the express invitation of the employee in charge thereof, or by the acquiescence of such employee, the company is liable for the negligent injury of such child. *Wilton v. Middlesex R. Co.*, 107 Mass. 108, 9 Am. Rep. 11; *Buck v. People's St. Ry., etc., Co.*, 108 Mo. 179, 18 S. W. 1090; *Hestonville Pass. R. Co. v. Gray*, 1 Walker (Pa.), 513; *Hestonville, etc., R. Co. v. Biddle (Pa.)*, 16 Atl. 488. But where a boy was invited to ride upon the platform of a street car by the motorman and was injured in getting on the car, the company was held not liable for damages since the motorman acted beyond the scope of his authority in inviting the boy to ride, and the company owed no duty to him as a passenger. *Finley v. Hudson Elec. Ry. Co.*, 64 Hun (N. Y.), 373, 19 N. Y. Supp. 621.

The question involved is whether or not, under appellant's own testimony, appellee owed him any duty other than to avoid injuring him, if that could have been done, by the exercise of ordinary care, after his danger was discovered. It is not pretended that appellant was a passenger upon the car, nor can it be denied that he was a trespasser. The evidence does not show that the conductor, who was appellee's agent in charge of the car, saw him; but it is contended that the officer, by the exercise of ordinary diligence, could and should have seen him before he received his injury, and have prevented it, and this question, he claims, should have been submitted to the jury. Upon this claim arises the crucial question of this case — Whether or not appellee owed appellant any active duty in order to discover his peril. If so, then the peremptory instruction should not have been granted. In favor of this proposition, appellant's counsel cites two cases: *L. & N. R. Co. v. Thornton* (Ky.), 58 S. W. 796, and *Vanarsdall's Admr. v. L. & N. R. Co.* (Ky.), 65 S. W. 858. In the first of these, the court said:

"The theory upon which this case is based, and the recovery had — for it is carried into the instruction given *supra* — is that appellant owed to appellee a duty to prevent him getting off the moving train after those agents knew or had reasonable grounds to believe he was about to jump from the moving train. We are of opinion that the instruction, *supra*, given, is erroneous. There can be no negligence in failing to do unless there was a duty to do. Appellee, a boy seventeen years of age, and of reasonable intelligence, as shown by his testimony, is on a freight train by invitation of the fireman. He is not a passenger. The appellant owed him no contract duty. The train is not engaged in carrying passengers. Under these circumstances, it is clear that appellee was a mere licensee, if not a trespasser, and appellant owed him no duty, unless his danger was discovered in time to have prevented an injury by some agent of appellant. *Dalton's Admr. v. L. & N. R. Co.* (Ky.), 56 S. W. 657, and cases cited."

In the second of these cases, the facts were these: The decedent, Mary Vanarsdall, was a little girl, twelve years of age. At the time of the accident she was walking over one of appellee's railroad bridges. Before she could get off, she was run over and killed. In the opinion this court said:

"It must be conceded that the intestate was a technical trespasser, or, in other words, she had no lawful right to use the bridge as a passway, and that appellee was under no obligations to look out to see if she was upon

the bridge. But it is also a well-settled rule of law that if the defendant, its agents or employees in charge of the train, discovered the peril or danger of the intestate, it was its duty to use all reasonable efforts to avoid injuring her; and, if they failed so to do, the plaintiff would be entitled to recovery. If, however, the defendant used all reasonable efforts to avoid injury after discovering her peril, the verdict should have been for the defendant."

We are not able to recall any opinion of this court wherein the opposite principle to that contended for by appellant has been more clearly or definitely decided than in these two cases.

The question of appellant's infancy is immaterial, until it has been established that appellee owed him an active duty, as opposed to the passive duty of not injuring him after his peril was discovered. An infant of tender years may not be able to be guilty of contributory negligence, and in that respect his position is superior to that of one who has reached years of discretion. But contributory negligence presupposes the existence of negligence, and never becomes a factor in the problem until the defendant's duty, and his breach of it, have been established. If the defendant owed the appellant no duty, then the question of his infancy is immaterial. Appellant was a mere trespasser upon the rear steps of appellee's car, and those in charge of it did not owe him any duty of discovering his peril. In the case of *Jackson's Admr. v. L. & N. R. Co.* (Ky.), 46 S. W. 5, the decedent was a boy seven years of age, who was trespassing in the yard of the railroad corporation, where he was run over and killed. It was held that the corporation owed the decedent no active duty, and the judgment of the lower court, awarding the peremptory instruction, was affirmed. In the case of *Brown's Admr. v. L. & N. R. Co.*, 97 Ky. 228, 30 S. W. 639, the doctrine that the corporation owed a trespasser upon its tracks no lookout duty is fully maintained. See also *Kentucky Cent. R. Co. v. Gastineau's Admr.*, 83 Ky. 119; *Conley's Admr. v. Cincinnati R. Co.*, 89 Ky. 402, 12 S. W. 764; *McDermott v. Kentucky Cent. R. Co.*, 93 Ky. 408, 20 S. W. 380; and *L. & N. R. Co. v. Hunt* (Ky.), 13 S. W. 275.

We do not think the court erred in excluding the proffered testimony that the intersection of Eleventh and Patterson streets was in a thickly settled portion of the city of Newport; that many

children congregated thereabouts, and theretofore they had often trespassed upon appellee's cars, with the knowledge of the employees in charge thereof; and the cases of *Shelby's Admr. v. Cincinnati, New Orleans & Texas Pacific R. Co.*, 85 Ky. 224, 3 S. W. 157, and *Louisville & Nashville R. Co. v. Popp*, 96 Ky. 99, 27 S. W. 992, do not support this proposition. In the first of these cases, the infant decedent was killed by a backing car while he was on the defendant's switch, where he had the right to be; and the court found, as a matter of fact, that he was not a trespasser, but, on the contrary, said: "In our opinion, therefore, he had a lawful right to go upon the track at that place, and the company owed to him a duty of active vigilance." In the second case there is some general language which seems to give color to appellant's position with reference to the admissibility of this evidence, but an analysis of the opinion shows that the servants of the defendant corporation knew the appellee and his companions were in its switchyard and about its cars; and the case, after all, was made to turn upon the knowledge that the injured boy and his companions were in and about the cars, by the backing of which without notice the plaintiff was injured. In the action of *Louisville & Nashville R. Co. v. Webb*, 99 Ky. 335, 35 S. W. 1120, on the subject of testimony of this character it was said: "Over the objections of the counsel for appellant, testimony was admitted to prove what was said by the conductor to the boys, including the infant appellee, about helping to take freight from the train and riding from the tank on days previous to the day on which the accident happened. This testimony ought to have been rejected. The case was between the infant appellee and appellant, and the subject of the investigation was what occurred on the day the injury was inflicted, and what occurred on previous days had no necessary connection with, and was in no sense a part of, the transactions of that day. For this reason, also, the court properly refused to allow proof to be made in behalf of the appellee of what it was alleged the conductor and trainmen said to the boys on the occasion before that day about swinging on the ladders attached to the side of the car, and telling them to do this in order to learn to be 'hoppers,' and the like, and that the boys were in the habit of practicing in that way on previous occasions

when they rode to the tank." This, we think, states the sound rule on this subject.

Appellee, although it was a common carrier of passengers, owed the infant appellant no different duty than was owed him by the owner of any other vehicle plying the streets of Newport. As he had a right, in common with the general public, to use the public highways, appellee, in common with all other owners of vehicles, owed him the active duty of exercising ordinary diligence not to run over him; but neither it nor they were under any duty of anticipating his trespassing on the rear end of the vehicles while they were being driven or propelled along the streets. Suppose a private carriage is being driven along the street; must the driver maintain a lookout to see that small boys are not stealing a ride by climbing up in the rear of the vehicle, and thereby placing themselves in positions of danger? Surely not, and yet it will be difficult to draw a distinction between the case at bar and that supposed. The fact that there was a conductor on appellee's car would not alter the case. The conductor's duty is primarily to attend to his passengers, not to look out for trespassers; and, while the presence of the conductor would necessarily increase the chances of the actual discovery of the infantile trespasser, it would not add the duty of an active vigilance to make the discovery of his presence and danger.

Judgment affirmed.

Louisville Railway Co. v. Colston.

(Kentucky — Court of Appeals.)

1. DUTY TO SOUND GONG;¹ KNOWLEDGE OF PROXIMITY OF CAR.—The purpose of sounding gongs on street cars is to notify persons on or about to cross the track that the car is approaching, so that they may govern their actions with safety. The failure of a motorman to sound the gong is not negligence, if a pedestrian injured in a collision sees or knows of the proximity and approach of the car.

1. Failure to sound gong.—Motormen, gripmen, and drivers operating street railroad cars are bound to be watchful at all points, elsewhere as well as at street crossings, especially in a crowded city, and to use all reasonable means

2. **RIGHT OF WAY OVER STREET-CAR TRACKS.**—A pedestrian who is about to cross the tracks of a street railway at other points than regular crossings should yield the right of way to an approaching car. A motor-man is not required to stop his car when he sees a pedestrian leave the sidewalk and approach the track as if about to cross at such a point. He should, however, exercise every care in his power to avoid injuring such a pedestrian where he has notice of the latter's peril. He would not be deemed to have had notice of such peril unless by the pedestrian's actions he could see that she was oblivious of the nearness of the car and intended to continue her course without regard to it.

APPEAL by defendant from judgment for plaintiff. Decided March 4, 1904.
Reported 25 Ky. Law Rep. 1933, 79 S. W. 243.

Fairleigh, Strauss & Fairleigh, for appellant.

O'Neal & O'Neal, A. E. Willson, and R. T. Colston, for appellee.

Opinion by O'REAR, J.

Appellee was injured while crossing the intersection of Bismark and Twenty-eighth streets by one of appellant's cars running against her. She was crossing the intersection diagonally, so as

to avoid accidents and injury to persons crossing the street, and to respect the equal rights of others to the use of the public streets. *Nellis Street Railroad Accident Law*, p. 244. In conformity with this general rule the cases are numerous to the effect that a warning should be given, either by the sounding of a gong or otherwise, upon the approach of a street car to a street crossing, although the car is being operated at a usual or ordinary speed. See *Driscoll v. Market St. Cable R. Co.*, 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203 (holding that a failure to ring a bell at a street crossing as required by a reasonable municipal ordinance is negligence, and renders the company answerable to a person injured by an accident, of which such failure was the proximate cause); *Owensboro City R. Co. v. Hill*, 21 Ky. Law Rep. 1638, 56 S. W. 21; *Louisville Ry. Co. v. French*, 24 Ky. Law Rep. 1278, 71 S. W. 486; *Gray v. St. Paul City Ry. Co.*, 87 Minn. 280, 91 N. W. 1106; *Consolidated Traction Co. v. Chenowith*, 61 N. J. L. 554, 35 Atl. 1068; *Dennis v. North Jersey St. R. Co.*, 64 N. J. L. 439, 45 Atl. 807; *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682, 34 Atl. 1094; *Mitchell v. Third Ave. R. Co.*, 62 App. Div. (N. Y.) 371, 70 N. Y. Supp. 1118; *Fandel v. Third Ave. R. Co.*, 15 App. Div. (N. Y.) 426, 44 N. Y. Supp. 462; *Hall v. Ogden City St. R. Co.*, 13 Utah 243, 44 Pac. 1046; *Mitchell v. Tacoma R. & M. Co.*, 9 Wash. 120, 37 Pac. 341.

to reach the opposite side and corner to take passage on the car. She had seen the car approaching, and had motioned to the motorman that she wanted to get on it. The motorman saw her, and understood her signal. There were other passengers waiting at the corner for the car. Without looking back or paying further heed to the approaching car, appellee continued her course. As she stepped upon the track, the car struck her. The motorman saw her plainly. But although she was going at an angle intersecting the track at a point in advance of the car, he thought that she would pause long enough to let the car pass, and then cross behind it, as is usual. Instead, she stepped upon the track too late for him to stop the car before striking her. It is complained that he neither sounded his gong, nor gave other signal of his approach. The purpose of sounding gongs on street cars is to notify persons on or about to cross the track that the car is approaching, so that they may govern their actions with safety. Where, however, the pedestrian sees the car, and knows of its approach, every purpose of the rule for sounding the gong has been fulfilled. The failure,

In the case of *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1, it was held that a street railway company is guilty of negligence if the motorman on one of its cars fails to give warning by sounding a bell or otherwise on the approach of such car to a public street crossing. And in the case of *Fenner v. Wilkesbarre, etc., Traction Co.*, 202 Pa. St. 365, 51 Atl. 1034, it was held that it was negligence for a motorman to fail to give warning of the approach of his car when he sees a wagon on the track, although the place of the accident was not at a street crossing.

Unless the motorman has a good reason to believe that the occupants of a vehicle being driven along the track are aware of the approach of his car, he should give a warning signal before running his car forward at a speed likely to cause a collision. *Tashjian v. Worcester Consol. St. Ry. Co.*, 177 Mass. 75, 58 N. E. 281. See also *Murphy v. Derby St. Ry. Co.*, 73 Conn. 249, 47 Atl. 120; *Consolidated Traction Co. v. Haight*, 59 N. J. L. 577, 37 Atl. 135; *Devine v. Brooklyn H. R. Co.*, 34 App. Div. (N. Y.) 248, 54 N. Y. Supp. 626.

The absence of a municipal ordinance requiring the ringing of a bell by the operators of a street cable-car line, at street crossings, or elsewhere, does not relieve the company from liability for personal injuries sustained by being struck by a car, which could have been prevented if the gripman had not negligently failed to give his signal upon observing the person injured in a dangerous position. *Mitchell v. Tacoma R. & M. Co.*, 9 Wash. 120, 37 Pac. 341.

Where a street-car motorman sees one working on the tracks in front of

therefore, of the motorman to sound the gong, is not negligence to such pedestrian, if the latter sees or knows of the proximity and approach of the car.

The instructions fairly state the law of the case, except in qualifying the defendant's right to rely on plaintiff's contributory negligence. The jury were told that if the plaintiff was herself negligent in going upon the track, and that but for her negligence she would not have been injured, the jury should find for the defendant, although defendant's servant in charge was negligent as charged, unless they further found from the evidence that defendant knew of her peril, or by ordinary care might have discovered it, in time to have avoided injuring her by the use of ordinary care. This rule of qualification has been approved and applied in certain cases where it was the duty of the railway company to be on the lookout for persons rightfully using its tracks at the point of injury. But we are of opinion that the instruction had no place in this case. Plaintiff was not in apparent peril until the moment she stepped upon the track, or showed her in-

a car, and knows that he is not aware of its approach, he must use every precaution to avoid an accident, and a mere sounding of the gong will not relieve the company from liability. *Houston City St. Ry. Co. v. Woodlock* (Tex. Civ. App.), 29 S. W. 817.

Contributory negligence.—The failure of the employees in charge of a street car to keep a proper lookout or to give warning of the approach of the car does not render the company liable for an injury to a pedestrian crossing the track, who was himself guilty of contributory negligence. *Hot Springs St. R. Co. v. Johnson*, 64 Ark. 420, 42 S. W. 833; *Watson v. Mound City St. Ry. Co.*, 133 Mo. 246, 34 S. W. 573; *McQuade v. Metropolitan St. Ry. Co.*, 17 Misc. Rep. (N. Y.) 154, 39 N. Y. Supp. 335.

Other cases reported in this series where the question of a street railway company's negligence for failure to sound gong upon approaching a street crossing was considered are: *Union Traction Co. v. Vandercook*, 2 St. Ry. Rep. 231, (Ind. App.) 69 N. E. 486; *Dalton v. N. Y., N. H. & H. R. Co.*, 2 St. Ry. Rep. 429, (Mass.) 68 N. E. 830; *Buren v. St. Louis Transit Co.*, 2 St. Ry. Rep. 616, (Mo. App.) 78 S. W. 680; *Warner v. St. Louis & M. R. Co.*, 2 St. Ry. Rep. 520, (Mo. Sup.) 77 S. W. 67; *Peterson v. Minneapolis St. Ry. Co.*, 1 St. Ry. Rep. 419 (Minn.), 95 N. W. 751; *Murray v. St. Louis Transit Co.*, 1 St. Ry. Rep. 509 (Mo.), 75 S. W. 611 (in which case it was held error to submit to the jury the question of whether or not the gong was sounded, where the plaintiff testified that he distinctly saw the car coming toward the crossing).

tention to do so. Being close to the track did not, alone, constitute peril. It was impossible for the motorman to know what was in her mind, or that she intended doing such an unusual and hazardous thing as to step in front of a car which she had just seen, and which he knew she had seen, and which she knew was passing over the track to the usual and known stopping place at the corner. It is common, and very common, for persons to cross the street railway tracks at other points than regular crossings, especially in crossing street intersections diagonally. The motorman's duty is then to warn the pedestrians of the car's approach. If, every time a motorman sees a pedestrian leave the sidewalk and approach the track, he must stop his car, such traffic would have to yield to the pedestrians entirely. While pedestrians have an equal right with others to use the streets in the ordinary manner, yet they must do so with respect to the rights of other travelers, including the street cars. As the latter are bound to go on their tracks alone, and cannot give way or stop so easily as the pedestrian, the latter reasonably should yield the right of way along the track. This is both customary and necessary, and must be known alike to the motorman and pedestrian. Each should govern his actions accordingly, unless he has notice that the other is about to disregard the rule and his own safety. In that event, however unjustifiable the other may be, every care then within the motorman's power to avoid injuring the other must be observed. Appellee may have been in peril, in one sense, from the moment she started from the sidewalk toward the track. But aside from her having for the moment lost thought of the danger to herself, and, therefore, determined to continue her course across the track ahead of the approaching car, she was not apparently in peril. To the mind of the motorman, she was not in peril unless by her actions he could see that she was oblivious of the nearness of the car, and intended to continue her course without regard to it. But there was nothing in the evidence in this case that would reasonably indicate that to the motorman. The qualification of the instruction as given was misleading.

Reversed and remanded for a new trial under proceedings not inconsistent herewith.

Heebe v. New Orleans & C. Railroad, Light and Power Co.

(Louisiana — Supreme Court.)

1. ACCIDENT AT CROSSING; DUTY TO LOOK AND LISTEN.¹—The recognized rule is that before attempting to cross a railway track a person should stop, look, and listen, and it will hardly do to substitute for it a rule to the effect that, being at a distance from a crossing, toward which he and an electric or steam car are traveling, he may then form an opinion as to which of the two will get there first, and, acting upon that opinion, essay the crossing without giving himself further concern upon the subject.
2. EXCESSIVE SPEED; CONTRIBUTORY NEGLIGENCE.—The fact that a street railway company has operated a car at too high a rate of speed will not entitle a party who is injured to recover if it appears that the fault of the company would not have caused the injury save for the supervening and greater fault of the party injured.

(Syllabus by the court.)

APPEAL by defendant from judgment for plaintiff. Decided June 22, 1903.
Reported 110 La. 970, 35 So. 251.

Statement of facts by MONROE, J.

This is an action in damages for personal injury sustained by plaintiff, who, whilst driving across defendant's railway tracks on St. Charles avenue at the intersection of Marengo street, was run into by one of defendant's cars, with the result that his wagon was overturned, and one of his legs was so badly crushed as to necessitate amputation. He alleges that he approached the crossing slowly and carefully, and looked and listened, and that he saw no car nearer than Napoleon avenue; that the accident was in no way the result of any fault or negligence on his part, but was caused entirely by the gross negligence of the defendant's employees; that the motoneer of the colliding car could and should have seen his horse and wagon in time to have stopped his car, but that he was either not attending to his duties, or else, by reason of the reckless and dangerous speed at which the car was going, he delayed attempting to stop until it was too late; and that he gave no warning of his approach.

1. The cases reported in this series relating to the duty of pedestrians and drivers of vehicles to look and listen before crossing street railway tracks are cited in the note to *Chicago City Ry. v. O'Donnell*, *ante*, p. 172. See also monographic note to *Wolf v. City & Sub. Ry. Co.*, 1 St. Ry. Rep. 667.

The defendant denies the negligence imputed to it, and alleges that the accident was caused entirely by plaintiff's negligence, or at least by his contributory negligence. The case was tried in the District Court before a jury, nine of whom found a verdict for the plaintiff in the sum of \$2,500, which was made the judgment of the court. The defendant has appealed, and the plaintiff has answered, asking that the amount allowed be increased to \$25,000, as prayed for in the petition.

We find from the record that:

The plaintiff is a baker, who lives and conducts his business on Carondelet street, near Marengo, and has done so for thirty years; Carondelet street being the next street upon the woods side of, and parallel to, St. Charles avenue, and St. Charles avenue having two roadways, with a strip of ground between, upon which the defendant operates a double-track electric railway. The plaintiff has customers upon the river side of the avenue, and in delivering bread to them, and for other reasons, has been in the habit of crossing the defendant's railway tracks at the intersection of Marengo street at least six times a day. Upon the morning of the accident he started out, as usual, at four o'clock, and, having delivered his bread, and being on his way home, he entered the roadway on the river side of St. Charles avenue, through Milan street, which is the next street above and parallel to Marengo. He was seated inside of a covered, four-wheel wagon, from which he could not see upon either side unless he leaned forward for that purpose, and he was driving a fast mule. He states that when he entered the avenue he looked up and down, and saw no car in either direction, and that he drove at a trot down the river side roadway in the direction of Marengo street (325 feet distant), with the intention of crossing the railway at that point. He further states that when about eight yards from the crossing he looked out for cars, and saw one standing at Napoleon avenue, which avenue crosses St. Charles two blocks above Milan street, and three blocks, or, say, 1,000 feet, above Marengo; that, seeing no other car, he drove on, without stopping, looking, or listening, and, making a wide turn, was crossing the track nearest to him at a fast walk, and had almost crossed, when the left hind wheel of his wagon was struck by a down-coming car with such force that he was thrown about nine feet in the air, and the wagon and mule were thrown to the other (woods) side of the railway, into the street, the result, so far as he was concerned, being that his leg was badly broken, and was subsequently amputated, a few inches above the ankle.

The plaintiff adheres throughout his testimony to the theory that the colliding car was the car which, while driving at a trot toward, and when within eight yards of, Marengo street, he had but a few seconds before seen standing at Napoleon avenue. He admits that after the occasion mentioned (when he was eight yards from the crossing) he did not again look for a car until the moment of the collision, and that it was then too late for him to get out of the way, although, as the car struck only the tire on the rear of the left hind wheel of the wagon, it is evident that but little acceleration of the speed of the mule would have been required for that purpose. As a matter of fact, the

plaintiff was not thrown nine feet in the air, nor was the wagon thrown with the violence described by him. He was on the lower section of the crossing, and the head of the mule was a little farther down-town than the tail of the wagon, so that when the wheel was struck from behind by the car (although the speed of the latter had been so much reduced that it was stopped on the foot crossing but a few feet farther on) it (the wagon) was lifted some inches, possibly a foot, and a forward movement was given to it, and either that or the movement (involuntary, perhaps) of the mule brought it in contact with an iron post or wheel-guard which stands in the ground at the lower (woods) side of the crossing, and both wagon and mule were overturned, and the plaintiff was taken from beneath the wagon. There were seven persons near by, who profess to have seen the accident, and to know something of the situation of the parties just before it occurred.

Devere, a machinist, sworn for the plaintiff, was approaching the scene from the woods side, on the lower side of Marengo street, and he testifies that when the accident occurred he was all of 175 feet away, near a certain gate, walking rapidly toward the avenue. He also testifies that when the plaintiff turned to make the crossing, at which time he must have been more than 175 feet away, there was no car in sight as far as Milan street, but that when the plaintiff was crossing, and was nearly across, the track, he (the witness) saw the car which inflicted the injury coming at very high speed, and that the thought struck him, "Will he escape?" At one time he seems to place the car when he first saw it, and when Heebe was crossing the track, just below Milan street, and at another time he seems to place it at a distance of only seventy-five feet from Marengo street, and he says that the gong sounded twice, and then, as the collision occurred, a third time. It otherwise appears that from the point on Marengo street from which the witness states that he witnessed the accident he could not have seen up the railway on St. Charles avenue as far as Milan street, and, as he was walking rapidly toward the avenue, and must, therefore, have been still farther back before the accident occurred, it follows that when the plaintiff turned to make the crossing he was not in a position to know just how far below Milan street the car was.

Paul Croon, a colored man, sworn for the plaintiff, testifies that he crossed the track, going in the direction of the river, and that he met the plaintiff driving on the track just as he (witness) had crossed; that as he crossed he saw the car near the drug store, on the lower corner of Milan street, and that he had just reached the banquette on the river side of St. Charles avenue when the collision occurred. He also undertakes to say where the car struck the wagon and where the plaintiff fell, and he states that the mule was trotting across the track, and that, after striking the wagon, the car ran half way to the next street below before it was stopped. We make the following excerpts from the testimony of this witness:

"Q. As you were going from the woods side track, you looked up the street? A. Yes, sir. Q. You saw this car coming, plainly? A. Yes, sir; I saw it coming down. Q. Below the drug store? A. This side of the drug store

somewhere. Q. The drug store is on the corner of Milan street? A. Yes, sir; Milan. Q. You were on the corner of Marengo street? A. Yes, sir. Q. That is one square below Milan? A. Yes, sir. Q. There was nothing to prevent you from seeing the car? A. I saw the car this side of Milan. Q. You saw it plainly? A. Yes, sir. Q. You saw it was coming fast? A. Yes, sir. Q. You heard the noise it was making? A. I just see the car coming. Q. You said you heard the noise of the car? A. Yes, sir; but no bell at all. Q. Just at that moment, when you looked up, you saw Heebe coming? A. He was just coming across. Q. He was not on the track? A. Just as I see the car first he passed me, the car passed him, the car got to him so quick, I don't know how he got there. Q. The car reached the track before you could cross? A. Just did pass it, and got out of the way. Q. You looked up the street, saw the car coming, and at that very minute you saw Heebe coming across? A. Yes, sir. Q. And before you could walk over one track, was it there? A. Yes, sir. Q. Before you could well cross one track, the wagon was struck by the car? A. Yes, sir; before I could get to that window the wagon was struck by the car. (Note. Counsel for plaintiff paces off his steps, and says it is five of his strides, say, twelve feet.) Q. You looked up when you were crossing that track—the woods side or the river side? A. The river side track, I was crossing, and the car was coming down the river side track. * * * Q. You did not look up to see the car until you crossed the river side track? A. Just as I crossed it. Q. Well, had you gotten off the track when you looked up? A. I just had gotten off. Q. And when you looked up that time, you saw the car coming? A. Yes, sir. Q. Where was Mr. Heebe's horse's head when you stepped off the track? A. He hadn't got his hind wheels—he just was crossing the time I looked up and stepped over. I heard the car strike the wagon, 'Bim'! * * * Q. You walked how many steps of yours when you heard the crash? A. I just stepped to the banquette. I hadn't got as far as from here to the door. Mr. Heebe hadn't got across. Q. You hadn't gone twelve feet away from the track, when you heard the crash? A. No, sir. * * * Q. Isn't it true that you hadn't reached the street? A. I had just left the track, going across to the banquette. I hadn't gotten there. Q. You had not reached the middle of the street yet? A. No, sir."

Of course, if, as the witness says, he first saw the car as he was crossing the woods side track, he did not first see it just after he stepped off the river side track; and if he first saw it after he had stepped off the river side track, and it was then near Milan street, 325 feet away, he did not just pass it and get out of the way; and if he had only reached the middle of the street when he heard the crash, he could not have reached the banquette on the other side; and if he was walking away, with his back to the scene, he could not have witnessed what transpired, etc. If there is anything at all to be derived from the testimony of this witness, it is that Heebe drove his wagon on the track in dangerous proximity to the approaching car.

Priscilla Sanders, a colored woman, sworn for the plaintiff, was occupying the rear seat on the river side in the car in question, and was engaged in

looking out of the window until just as the car passed the drug store on the corner of Milan street, when she happened to turn her eyes to the front, and saw the plaintiff's wagon crossing at Marengo street. She says that the mule and the front of the wagon had already crossed at that time, and that only the back part of the wagon was on the track. She also states that she saw a movement of the reins, though she could not see the driver of the wagon, and that the motorman, about the middle of the square, applied his brake, but that, nevertheless, before the tail of the wagon cleared the track, it was overtaken by the car, which, however, stopped immediately afterward. It is only necessary to add that no speed that is attributed to the car could have enabled it to strike the wagon under the circumstances described by this witness.

Deneger, a machinist, sworn for the defendant, was standing upon the upper (woods) side of the crossing at Marengo street, waiting for an uptown car. He testifies that when the colliding car was within 100 feet of the crossing the plaintiff was still on the roadway, about eight yards from the corner; that when the plaintiff started to cross the track the car was about a quarter of a block away; that the motorman cut off the power and applied his brake, and that the car was stopped almost instantly after striking the wagon.

Tournabene, the motorman of the car in question, testifies that he saw the wagon on the roadway about ten feet from the corner when he was about 150 feet from that point; that he rang his bell, and that the wagon went on down the street until he was within about fifty feet of the crossing, when it turned "around and shot right ahead of the car;" that he did his best to stop the car before striking the wagon, and was unable to do so, but that it was stopped on the lower foot crossing. He also states that he had been using all the power provided and going at full speed, and that, after shutting off the power and putting on the brakes, he further attempted to stop the car by reversing the power, and that he burned out a fuse.

Rosché, the conductor, testifies that his attention was first attracted by the gong and by the efforts of the motorman to stop the car, and that the plaintiff's mule was then going on the track forty feet in front of the car.

Parker, a motorman, who had just come off night duty, and was going home as a passenger in the car in question, testifies that his attention was attracted by the gong; that the car was then about seventy-five feet from the corner, and that the wagon gave some indication of crossing the track; that "you couldn't tell," however, whether it was the purpose of the driver to cross or not, but that when the car came nearer he shot right across; that the motorman had kept ringing his bell and trying to stop the car, but was unable, under the circumstances, to avoid the collision.

A number of witnesses were interrogated as to the speed of the car, and our conclusion is that it was not under, but, if anything, exceeded, fifteen miles an hour. Other witnesses were interrogated as to the distance within which a car can be stopped, and from the preponderance of the testimony it appears that a motorman who stops a car, such as the one in question—

over thirty feet long, weighing 14,000 pounds, and traveling at the rate of twelve miles an hour — within from 100 to 120 feet, does uncommonly well. One of the witnesses sworn on behalf of the plaintiff, and professing to be an expert, testifies that a car of that description, equipped with sand boxes, can be stopped within fifteen or seventeen feet. And one of the defendant's witnesses gave some such testimony, but subsequently admitted that he was in error.

Dart & Kernan, for appellant.

James Wilkinson, Arthur John Peters, and E. Howard McCaleb, for appellee.

Opinion by MONROE, J.

Counsel for the plaintiff concede that, if the plaintiff was within eight yards of Marengo street when he saw a car standing at the corner of Napoleon avenue, and continued, as he unquestionably did, on his course, the car that he saw could not have traveled, say 1,000 feet, and have collided with his wagon before the wagon cleared the track at the Marengo street crossing; and they propound the theory that another car intervened between the plaintiff and the car that he saw at Napoleon avenue, the proposition being thus stated in their brief: "We think the real truth in this case is that Heebe did look out the first time, and saw no car in sight; that he did look out the second time, and saw and heard no car save the one he saw at Napoleon avenue, but that the car that did the damage to him was, when he looked out the second time, then approaching at full speed, above the corner of Milan street, hidden by a clump of china-ball trees in full bloom, in June, just below the corner of Milan street, on the river side."

We have not, in the preceding statement of the case, referred to the trees thus mentioned, because the evidence entirely fails to show that they could have prevented, or did prevent, the plaintiff from seeing any approaching car, he (himself) testifying that the foliage upon a few trees mentioned by him was seven or eight feet above the ground, and not intimating that it had that effect, but insisting that the car which collided with his wagon was the one which he saw standing at Napoleon avenue; and because it

does not at all appear that the defendant was responsible for the position of the trees, or for any effect that they may have had in obstructing the plaintiff's view of the railway; and again, because, even if the defendant were so responsible, and the foliage had been so dense, all the way from Marengo street to Napoleon avenue, as to have concealed any car that might have been coming down, it would have afforded the plaintiff no justification for driving on the railway without using some precautions to find out whether he could do so in safety. On the contrary, such a condition of affairs would have made it all the more necessary for him to have stopped, or at least to have looked, immediately before attempting to cross at Marengo street, since he would not otherwise have been able to inform himself of the danger which might threaten such an attempt. The truth, as we conceive it to be, from our reading of the testimony, probably is that the plaintiff was mistaken in saying that he was within eight yards of the Marengo street crossing when he saw the car standing at Napoleon avenue. He was asked, while on the stand, the length of his mule and wagon, and he was unable even to approximate it, though they are objects with which he is necessarily very familiar. What reason, then, is there for supposing that he could, at some subsequent time, approximate the distance between him and the corner when he looked out of his wagon, on the morning of the 19th of June, to see whether a car was coming? His statement of the distance was at most a mere guess; and as we think, with him, that it was the car that he saw at Napoleon avenue that collided with his wagon the guess was wide of the mark, for, assuming that the car came down at the rate of twenty miles an hour, and that plaintiff was traveling no faster than two miles an hour, he must needs have crossed the track in safety, since he had considerably less than one-tenth as far to go as the car. The plaintiff was, however, traveling at a better speed than two miles an hour, for he says that his mule was fast, and that he trotted on the roadway and walked fast when he started to cross the track, and, as the mule and his master were returning home at a time and under circumstances which justify the belief that the morning meal was awaiting them, it is not likely that he is mistaken.

If our conclusion as to the car that did the damage be correct, and the plaintiff made his reconnaissance at a point farther up the avenue than he has stated, it seems most probable that the deplorable misfortune which befell him resulted from his relying upon his judgment as to the speed at which the car would travel as compared with that of his mule, and from his driving upon the railway without again looking to see whether his judgment was correct. The rule that has been laid down in cases such as this is that the individual must stop, look, and listen before attempting to cross a railway, and it will hardly do to substitute for it a rule to the effect that, being at a distance from a crossing toward which he and an electric or steam car are traveling, he may then form an opinion as to which of the two will get there first, and, acting upon that opinion, essay the crossing without giving himself further concern upon the subject. If the car in this instance was traveling at no higher speed than fifteen miles an hour, the defendant was not at fault, for, although a railway company may not always run its cars at the maximum rate allowed by law, regardless of the particular conditions existing at the moment, there were no particular conditions existing on St. Charles avenue, at a quarter to 6 o'clock on the morning of the 19th of June, 1901, which rendered it improper or unsafe to operate a car at that speed. It is likely, however, that the car in question was running at a higher rate of speed than fifteen miles an hour, and, in so far as the speed exceeded that rate, the defendant was at fault, since that is the maximum rate allowed by the ordinances of the city at that point. But the fault of the defendant would not have caused the accident save for the supervening, and greater, fault of the plaintiff, who, as he came down the street, having guessed at the probable speed at which the car that he saw, and which he knew would soon be in motion, would come down, as compared with the speed of his mule, sat inside of his wagon, where he could see upon neither side, and, as it appears, heard nothing, and drove into a position where a collision was to have been expected if his guess proved to be wrong, and where, as it turned out, a collision was inevitable. If the defendant had stopped and looked and listened before driving in his hooded wagon upon the railway track,

he could and would have seen the car coming at high speed, and he might have governed himself accordingly, or if he had looked or listened, even after he had started across, the accident might readily have been averted; since, as the car struck only the tire upon the back of the left hind wheel of the wagon, it is evident that the slightest acceleration in the movement of the mule would have carried the entire wagon beyond the danger; but, neither looking nor listening, the plaintiff drove in front of the too rapidly moving car within a distance so short that the motorman, without his co-operation, was unable to save the situation.

An effort was made during the trial to show that sand boxes are necessary to the proper equipment of a street car, and that, if the car in question had been so provided, it could have been stopped within a shorter time and distance. The petition, however, charges negligence only in the matter of running too fast, and makes no attack upon the defendant's equipment, and the evidence, as offered, was properly excluded. Moreover, the witness relied on to establish the proposition stated is he who testified that a car over thirty feet long, weighing over 14,000 pounds, and traveling at the rate of twelve miles an hour, can be stopped within a minimum distance of fifteen feet, or in less than one second of time, and we think that the credibility of his testimony is open to question, the more particularly as it appears that it took him, an avowed expert, three and one-half seconds merely to go through the motions necessary to apply the stopping power. The plaintiff appears from the evidence to be a worthy citizen, and the misfortune he has sustained is greatly to be deplored; but, whilst the defendant is, perhaps, not wholly free from blame, that misfortune is mainly attributable to the plaintiff's own imprudence, and its consequences cannot justly be visited upon another.

It is, therefore, ordered, adjudged, and decreed that the verdict and judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of the defendant, rejecting the demand of the plaintiff at his cost in both courts.

Sharp v. New Orleans City Railroad Co.

(Louisiana — Supreme Court.)

INJURY TO PASSENGERS.— It is not negligence for a street car to start while a passenger is in the act of passing from the platform into the car.¹

(Syllabus by the court.)

APPEAL by plaintiff from judgment for defendant. Decided June 22, 1903.
Reported 111 La. , 35 So. 614.

John F. C. Waldo, and *Dinkelspiel & Hart*, for appellant.

Denègre, Blair & Denègre and *Victor Leovy*, for appellee.

Opinion by PROVOSTY, J.

Plaintiff, a man over seventy years old, and weighing 220 pounds, hailed a street car at the corner of Basin and Canal streets, in the city of New Orleans. He was accompanied by his wife. He carried an umbrella. Whether he did not also have a paper bag of grapes in his hands is a disputed point in the case. The car was on Basin street, the river side, and was going toward Canal. The tracks go into Canal by a wide, easy curve, turning to the left, or toward the river. The car stopped just short of the crossing, or prolongation of the Canal street sidewalk, across Basin street. Plaintiff was on the wrong side of the car for getting in, so that he and his wife had to go around the car. In doing so

1. Starting car before passenger is seated.— A car should not be started before a passenger has had an opportunity to get aboard and reach a place of safety. *De Rozas v. Metropolitan St. R. Co.*, 13 App. Div. (N. Y.) 296, 43 N. Y. Supp. 27. See also 6 Cyc. 616, and cases cited.

The time to be allowed a passenger for getting on board a street car is dependent on the special circumstances of the passenger as to his physical ability, the existence of a crowd on the car platform, and other similar matters. Even in respect to a railway train it is not necessarily negligence for the train to be started before a passenger has gotten on board the car and reached a seat. See *Louisville, etc., R. Co. v. Hale*, 102 Ky. 600, 44 S. W. 213.

they passed around the rear end of the car. The witnesses do not differ as to where plaintiff and his wife stood in hailing the car, but they disagree somewhat as to whether the car was short of the crossing, or stood on it, or had passed it, when plaintiff attempted to get on. We adopt the statement of the motorman, who says he stopped at the usual place — short of the crossing. Plaintiff's wife got on, and plaintiff followed or attempted to follow. At this point begins the serious divergence in the testimony, and arises the question upon which the case must turn.

Plaintiff says the car was started before he had gained a secure foothold on the platform, and while he had one foot on the platform and was in the act of lifting the other foot from the step, and that he lost his balance from the jerk of the car, and could not maintain his hold on the car as it rounded the curve, and so he fell.

Defendant says that plaintiff was already on the platform and in the act of stepping into the doorway.

Accordingly, as the one or the other of these statements is accepted, the case must be decided. If the car was started before plaintiff had gained a secure footing on the platform, the defendant company was negligent and is responsible. *Wardle v. Railroad Co.*, 35 La. Ann. 202; *Howell v. Railroad Co.*, 22 La. Ann. 603; *Lehman v. Railroad Co.*, 37 La. Ann. 705; *Nash v. Railroad Co.*, 52 La. Ann. 1199, 27 So. 661; *Kelly v. Railroad Co.* (recently decided), 32 So. 388; *Kennon v. Railroad Co.*, 51 La. Ann. 1599, 26 So. 466; *Boikins v. Railroad Co.*, 48 La. Ann. 831, 19 So. 737. On the other hand, if plaintiff was on the platform and about to enter the doorway, the defendant is not responsible; for it is not charged in the petition, and it is not shown, that the movement of the car, either in starting or after getting under way, was negligent or out of the ordinary; and certainly it is not necessary to wait until the passenger has taken his seat, or even has entered the doorway, before starting a car. Such a rule would preclude the carrying of passengers on the platform, and would materially affect the expeditious operation of the cars; and to no purpose, since experience shows that the contrary practice is not usually attended with any danger. It has been decided that street cars need not wait until passengers are seated before starting.

Herbich v. North Jersey St. Ry. Co. (N. J. Sup.), 47 Atl. 427. If defendant exercised due care in the operation of the car, it is clearly not responsible for plaintiff's fall and injury. Cars cannot be started without some jerk, and cannot be run in a curve without developing a centrifugal force. The dangers from these causes are incident to traveling on the cars, and a traveler assumes the risk of them. *Aiken v. Southern R. Co.*, 104 La. 163, 29 So. 1; *Gretzner v. Railroad Co.*, 105 La. 270, 29 So. 496; *Black v. Railroad Co.* (Sup.), 37 N. Y. Supp. 831.

In his statement regarding the untimely starting of the car, plaintiff is corroborated by the witnesses Dennis and Levy; and the conductor, in his statement that plaintiff was already on the platform and was entering the doorway, is corroborated directly by plaintiff's witness Phelan, and inferentially by the two witnesses Oster, uncle and nephew.

The witness Dennis is a colored man, who at the time of the accident was a driver for the New Orleans Excavating Company, and at the time of the trial had lost his job. He was on his wagon, driving across Canal street toward the car. The car had come up Basin street into Canal, and he had come down Basin street into Canal, Canal and Basin being intersecting streets. While plaintiff was in the act of entering at the rear end of the car on the wood side, it is doubtful whether the body of the car was not interposed between him and the witness. The track is two and one-half feet from the curb; the side of the car, therefore, was about six inches from the curb. Placing the wheel of the wagon equally close to the curb, the wagon and the car would be on a line fronting each other. Even placing the witness on the side of the wagon next to the curb (and the probability is that he was on the farther side, since he was driving, and had a companion with him), and his opportunity for seeing, as he claims he did, was scant indeed.

The witness Levy was on the other side of Canal street, which is 100 feet wide. His attention was centered on his two little boys, who were playing in the street, when it was attracted to the plaintiff by some one hallooing, "Oh, my God!" He saw plaintiff hanging onto the car with one foot on the step, and saw him fall as the car was swinging around the curve.

Plaintiff's witness Phelan was at the corner near the car; that is to say, within a few feet. He says plaintiff was on the platform in the act of entering the doorway. The two witnesses Oster, uncle and nephew, were driving a covered wagon across Canal street, and were passing the car when plaintiff fell right in front of their horse, eight or ten feet ahead. They saw plaintiff fall out of the car, but did not see him hanging to the side of the car, as he would have been if plaintiff and Dennis and Levy were correct in their statement of how plaintiff fell.

We have, then, plaintiff and Levy and Dennis testifying one way, and the conductor, Phelan, and the two Osters testifying the other way, with Dennis so located that his having been in a position to see is doubtful, and the witness Levy at some distance, and his attention attracted only after the accident had sufficiently progressed for the cries of distress to begin. In this condition of the case we have to agree with the judge *quo* by whom the case was tried, jury having been waived, that the proof preponderates on the side of defendant, or, at any rate, that plaintiff has not made his case sufficiently certain, although we must say that it is singular that plaintiff should have fallen — a man accustomed to riding on the cars and holding with one hand, as we find he was — and the car moving slowly. But we have to take the case as we find it.

The judgment is affirmed.

Govan v. New Orleans & C. Railroad Co.

(Louisiana — Supreme Court.)

1. **INJURY TO EMPLOYEE; CONTRIBUTORY NEGLIGENCE.**—Well aware of the situation of iron posts located near the electric car track, and to which were attached the wires supporting the trolley, and required to keep, and keeping, notice posted in his car giving warning to keep heads, arms, and body inside the car, and otherwise warned by his employers of the danger incident to his employment, and no duty being required of him calling for such act on his part, a conductor, nevertheless, thrust his head and neck out of one of the windows of the car and was struck by one of the posts distant eleven inches from the outside of the window

of the passing car. The car tracks and posts had been located pursuant to directions if the city engineer who had authority in the matter. Held, no recovery for damages legally possible.¹

(Syllabus by the court.)

APPEAL by plaintiff from judgment for defendant. Decided June 22, 1903.
Reported 111 La. 125, 35 So. 484.

Henry Chiapella and William Joseph Formento, for appellant.

Dart & Kernan, for appellee.

Opinion by BLANCHARD, J.

The plaintiff is the widow of Henry Govan, whose death, while in the service of defendant company, is the occasion of this suit.

She sues in her own behalf and that of her minor child, for whom she is tutrix.

1. Injury to employees by contact with obstructions at side of track.— See also *Hoffmeier v. Kansas City & Leavenworth R. Co.*, 2 St. Ry. Rep. 288, (Kan.) 75 Pac. 1117; *Withee v. Somerset Trac. Co.*, 2 St. Ry. Rep. 380, (Me.) 56 Atl. 204; *Houston Elec. Co. v. Robinson*, 2 St. Ry. Rep. 893, (Tex. Civ. App.) 76 S. W. 200. It is a duty of street railway companies to keep their tracks free from obstructions which would endanger the lives of their employees. *Wilson v. Denver, etc., R. Co.*, 7 Colo. 101, 2 Pac. 1; *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300, 90 So. 252, 25 Am. St. Rep. 47; *Wolf v. East Tennessee, V. & G. Ry. Co.*, 88 Ga. 210, 14 S. C. 199; *Chicago & I. R. Co. v. Russell*, 91 Ill. 298, 33 Am. Rep. 54; *Kearns v. Chicago, etc., Ry. Co.*, 66 Iowa, 590, 24 N. W. 231; *Allen v. Burlington, etc., R. Co.*, 57 Iowa, 623; *Holden v. Fitchburg R. Co.*, 129 Mass. 268, 37 Am. Rep. 343; *Gates v. Chicago, etc., Ry. Co.*, 2 S. D. 422, 50 N. W. 907; *Houston & T. Ry. Co. v. Oram*, 49 Tex. 341; *Texas & Pac. Ry. Co. v. Hohn*, 1 Tex. Civ. App. 361, 21 S. W. 942; *Riley v. West Virginia, etc., Ry. Co.*, 27 W. Va. 145; *Bessex v. Chicago, etc., Ry. Co.*, 45 Wis. 477. All of these cases pertain to injuries to brakemen on steam railroad trains caused by contact with obstructions erected in close proximity to tracks. The principles applicable thereto are also applicable to cases arising from injuries caused to street railway employees by poles and other obstructions along street railway tracks.

But where an employee of a railroad knows of the proximity of an obstruction near the track, and that such obstruction is dangerous he will be held to have assumed the risk and will be precluded from recovery for injuries caused by contact with such obstruction. *Content v. N. Y., etc., R. Co.*, 165 Mass. 267, 43 N. E. 94; *Pennington v. Detroit, etc., Ry. Co.*, 90 Mich.

She claims \$10,000 damages for the loss of husband and father, and another \$10,000 on account of the pain and agony it is alleged he suffered from his injuries preceding his death.

The defense is denial of negligence on part of the company and the averment that the death of Govan was due to his own negligence and carelessness.

The court below sustained this defense and plaintiff appeals.

The salient facts of the case as gathered from the record are:

The dead man was conductor on car No. 58 of the Canal and Claiborne streets line of electric cars in the city of New Orleans.

He had been conductor on that particular car three months, and had been, all told, in the service of the company as conductor on its cars for three years. His record of service was good. He was about forty years of age.

Claiborne street runs at right angles with Canal street, and a car coming out of Claiborne into Canal turns toward the river, which is distant about a mile from where the two streets connect.

506, 51 N. W. 634 (in which case a brakeman was injured while climbing down the side of a car by being struck by a post which stood close to the track; it appeared that he was an experienced railroad man and was familiar with the surroundings of the tracks; it was held that he assumed the risk in descending from the car, and that he could not recover); *Missouri Pac. Ry. Co. v. Somers*, 71 Tex. 700, 9 S. W. 741; *Seidmore v. Milwaukee, etc., Ry. Co.*, 89 Wis. 188, 61 N. W. 765. In the case of *Manning v. Chicago, etc., Ry. Co.*, 105 Mich. 260, 63 N. W. 312, it was held that a brakeman who enters the employment of a railroad company to work on a construction train, and who can see that the road is not finished, and that trees border it on either side, assumes the risk of being struck by a tree growing close to the track and in plain view.

The rule is, in respect to such injuries as in respect to other injuries to employees, that employees do not assume risks of peril from dangerous structures, unless they know of the dangers, or they are so obvious that they must be presumed to know them. *Scanlon v. B. & A. R. Co.*, 147 Mass. 484, 18 N. E. 209, 9 Am. St. Rep. 733. In this case a brakeman was injured by a signal post placed so near the track that it knocked him off of a ladder on the side of a freight car on which he was climbing, in the discharge of his duty, and it was held that it appearing that he was unfamiliar with the road and had not been informed of the existence of permanent structures so near the track as to make it dangerous to be in the place at which he was when hurt, the company was liable.

The rule as to the liability of street car companies for injuries resulting to conductors and motormen because of trolley-supporting poles and other

The tracks of the railway are laid on the neutral ground in the center of Canal street, with the roadway of the street on either side.

The track on the upper side of the neutral ground is the one used by the cars going out of Claiborne street and up Canal street toward the river. Near the river, or at the head of Canal street, a half circle is described and the cars go back down Canal street to Claiborne street on the track located on the lower side of the neutral ground.

A line of iron posts extended, at the time of the accident, from Claiborne street along Canal, and to these posts were attached the wires which supported the trolleys over the tracks.

These posts were placed at the edge of the neutral ground, just as far away from the outside rail of the tracks as it was possible to place them without putting them into the roadway of the street.

obstructions in close proximity to the track may be stated thus: The duty of a street railway company to this class of its employees is to provide a roadway in all respects reasonably safe for the running of its cars, and the performance of the functions imposed upon them by the exigency of the service, and they have a right to assume, without inquiry or investigation, that this duty has been discharged. If, as matter of fact, they know of unsafe conditions in any of these particulars, and continue in the service after the lapse of a reasonable time for the defects to be remedied, they assume this additional risk, though originally not incident to their employment. *Louisville, etc., R. Co. v. Hall*, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84; *Faren v. Sellers*, 39 La. Ann. 1011, 3 So. 363, 1 Am. St. Rep. 256; *Myers v. Hudson Iron Co.*, 150 Mass. 125, 22 N. E. 631, 15 Am. St. Rep. 176; *Scanlon v. Boston & A. R. Co.*, 147 Mass. 484, 18 N. E. 209, 9 Am. St. Rep. 733; *Soeder v. St. Louis Ry. Co.*, 100 Mo. 673, 13 S. W. 714, 18 Am. St. Rep. 724; *Titus v. Bradford, etc., R. Co.*, 136 Pa. St. 618, 20 Atl. 517, 20 Am. St. Rep. 944; *Pidcock v. Union Pac. Ry. Co.*, 5 Utah, 612.

In the case of *Hall v. Wakefield & S. St. Ry. Co.*, 178 Mass. 98, 59 N. E. 668, it was held that a street railway company could not be charged with negligence for a failure to provide a safe place for the conductor by reason of a tree close to the side of a car, the location of the track being determined not by the company but by the selectmen and road commissioners of the town, and it not appearing that the company had any right to remove the tree. In the case of *Sundy v. Savannah St. Ry. Co.*, 96 Ga. 819, 23 S. E. 841, it was held that, although a street railroad company is negligent in locating a post in too close proximity to the track, it is not relatively negligent as to a motor-man killed by colliding with such post while riding on the step of the front platform of such car and leaning outward and looking backward underneath the car, it being unnecessary for him to assume such a position.

They were so placed under the direction of the city engineer, who, by authority of the city council, supervised the laying of the tracks of the railway under the franchise grant made to the company by the city.

These posts had been standing in that position for five years prior to the accident, or two years before Govan entered the service of the company.

So that he had, as conductor of cars, run along Canal street, with the posts thus placed, a period of three years prior to his death.

Each car of the line passed along Canal street twenty-eight times a day. Multiplying the number of days going to make up three years by twenty-eight, and we have over 30,000 as the number of times Govan had passed along those posts, if he ran his car each day of the three years.

But allowing for sickness and days off, it is safe to say he had passed along by them something like 25,000 times.

He thus had knowledge of the exact location of the posts with reference to proximity to the car tracks and proximity to the passing cars.

In the cars on the line in question was kept posted a placard headed "Warning," the top line of which read: "Keep your head, arms, and body inside of the car."

And it is shown that the higher officials of the road always warned conductors and motoneers of the dangers incident to their positions.

About 5:30 P. M. on June 26, 1899, Govan's car was going up Canal street. When near the head of the street, with the car going at a good rate of speed, for some reason not shown with certainty, Govan, standing at the second window from the front of the car, on the up-town side of Canal street, thrust his head and neck, and evidently the upper part of his body, out of the window.

While in this position the left side of his head came in contact with one of the iron posts heretofore described, with the result that his skull was fractured by the blow. He lingered a few days and died.

The blow rendered him immediately unconscious and he hung suspended, with half his body out of the car window, his head and hands down.

The motoneer, hearing the "thud" of the blow, looked around, realized the situation, applied his brakes and brought the car to a speedy stop.

There were no passengers in the car at the time. The motoneer, with the assistance of others, lifted the unconscious conductor from the window and laid him within the car.

The distance from the center line of the car to the post was five feet.

The distance from the outside of the car at the window line to the nearest point of the post which did the damage was eleven inches.

Ruling.—In thus projecting his head, neck, and upper part of body out of the window, in spite of the warnings given and in spite of his knowledge of the location of the posts in the matter of their proximity to the passing cars, the conductor was guilty of that degree of heedlessness and negligence which, under the well-established rule of jurisprudence, bars his recovery.

The railway company laid its tracks and put the posts supporting its trolley wires where directed to do so by the city's engineer, who had a controlling voice in the matter.

But if the company were at fault, and the tracks and the posts might have been laid and placed so as to have allowed of a greater space between passing cars and the posts, the conductor had such knowledge of the situation, was so well aware of the danger attendant upon putting his head out of the window, that his act in doing so must be held to have been gross carelessness and the proximate cause of his injuries and death.

The company required of him no duty which called for such act on his part. His death by collision with the post was the result of his own fault.

So found the trial judge and we cannot but approve his finding. Judgment affirmed.

Muntz v. Algiers & G. Railway Co. et al.

(Louisiana — Supreme Court.)

1. **LIABILITY OF STREET RAILROAD COMPANY.**—A railroad corporation, by its very incorporation under the laws of the State, assumes as one of its primary obligations that it shall operate the road under such conditions as to properly secure the safety of the general public.
2. **NEGLIGENT OPERATION BY LESSEE.**¹—It is liable for injuries to persons caused by the wrongful or negligent operation of the cars upon the road, whether operated by itself or by another corporation to which it had leased it.

(Syllabus by the court.)

APPEAL by plaintiff from judgment for defendants. Decided November 30, 1903. Reported 111 La. 423, 35 So. 624.

Statement of facts by NICHOLLS, C. J.

The plaintiff brought suit in the parish of Orleans against the Algiers & Gretna Street Railway Company (or the Algiers, McDonoughville & Gretna Street Railway Company) and the Jefferson Street Railway Company, seeking to recover from them *in solido* the sum of \$15,000, with legal interest. The grounds upon which this demand was based are: That the defendants were corporations organized under the laws of Louisiana, and doing business as common carriers of passengers in the parish of Orleans, conjointly and separately operating horse cars between the parish of Jefferson and the fifth district of the parish of Orleans; that on or about the 27th of Decem-

Liability of lessor for negligence of lessee.—In the case of *Ft. Worth Ry. Co. v. Ferguson*, 9 Tex. Civ. App. 610, 29 S. W. 61, it was held that a street railway company which has leased its line cannot be thereby relieved of liability for injuries resulting from the lessee's negligent operation of the line. And in the case of *Breslin v. Somerville Horse R. Co.*, 145 Mass. 64, 13 N. E. 65, it was held that a horse railroad company, which, by its charter, is made liable for injuries to persons and property caused by negligence or mismanagement in the operation of its railroad, cannot escape liability by leasing its road, where neither the statute incorporating the company nor the act of the Legislature sanctioning such lease indicate by their terms that it was to be absolved from liability by such a course; and this is so, although the lessee assumes all liability, and agrees to defend all suits brought against the original company, and pay all judgments entered against it.

The rule in respect to the liability of a lessor for the negligence of its lessee in the operation of a street railroad is thus stated by Mr. Nellis (Nellis

ber, 1901, about 7 o'clock in the evening, in Goldsborough parish of Jefferson, Idelia May Muntz, the minor child of the plaintiff, aged about twelve years, was knocked down and run over by a car owned and operated by the defendants, so that her neck and limbs were broken and skull fractured, besides suffering other severe injuries, from which, after the most intense agony, she died shortly thereafter; that her death was caused by the fault and gross negligence of defendants, and by the fault and negligence of the driver in charge of the car which ran over and killed her, because the defendants failed to provide their car with proper lights, and with proper appliances and means to give signals and warning of the approach of the car; that the track upon which defendants' car was operated was of a narrow gauge, and laid on the public road, and his child was lawfully thereon, and did not know and was not warned of the approach of the car by which she was knocked down and killed, and received no warning either by the car or the driver thereof, and after she was knocked down and run over by the car the driver never stopped it, but continued on his journey to the terminal of the road in Gretna; and the said driver, if he had been attending to his duties, could have seen the child and have prevented the act which caused her death, but neglected to do so; and the car was running at an unlawful rate of speed through the town when it ran down, mangled, and killed his child; that the space between the tracks of the railway was generally used by the public as a foot passage, and the child's injuries and her resulting death were not caused by any fault on her part, and her injuries and death were caused directly and solely by the fault and gross negligence of defendants and their employees and agents.

The Jefferson Railway Company excepted that the court was without jurisdiction *ratione personæ*, as its domicile was in the parish of Jefferson, where the trespass complained of was alleged to have occurred. The exception was sustained, the suit as to that company was dismissed, and no appeal was taken from the judgment. The Algiers & Gretna Railway Company excepted to the petition:

First. Because the court was without jurisdiction, and, should the exception be overruled, that the petition was contradictory, self-destructive, and

Street Railroad Accident Law, p. 488): "The law seems to be well settled that a street railroad company, organized under general laws, cannot lease its road and franchise to another company, or to an individual, without the consent of the Legislature, so as to relieve it from its obligation to the public; and, when a lease is effected to another company, or an individual without statutory authority, the law seems to treat the lessee as the agent of the railroad company, for the purpose of determining controversies between the public and such company, and the company, as well as the lessee, is liable for injuries caused by the negligence of the lessee." See also *Ricketts v. Birmingham St. Ry. Co.*, 85 Ala. 600, 5 So. 353; *Abbott v. Johnstown, etc., R. Co.*, 80 N. Y. 27; *Durfee v. Johnstown, etc., R. Co.*, 71 Hun (N. Y.), 279, 24 N. Y. Supp. 1016; *Fisher v. Metropolitan Elev. Ry. Co.*, 34 Hun (N. Y.), 433.

the allegation in the petition that the Algiers Railway Company and the Jefferson Street Railway Company were "conjointly and separately operating horse cars" was without sense and meaning; that, as a matter of fact, plaintiff was in possession of full knowledge concerning its relation to the street railway in question; that it leased out said roadbed and tracks to Thomas Pickles on the 7th of March, 1903, and the cars of said road never belonged to it; that Thomas Pickles died, and his heirs sublet said road to Peter Meid on the 27th of August, 1897, by notarial act before Frank E. Rainold, notary; that on the 23d of January, 1899, he leased the same to Anthony Rubrich, and Anthony Rubrich, by notarial act of the 29th of April, 1899, sold his rights in and to the lease to the Jefferson Railway Company; that plaintiff knew that the Jefferson Railway Company was alone operating the road; that the petition disclosed no cause of action, because the driver through whose carelessness it was alleged the accident occurred was not and never had been in the employ of the Algiers & Gretna Railway Company.

It was subsequently agreed between plaintiff's attorneys and the attorney of the Algiers & Gretna Railroad Company that "the exception to the jurisdiction and the formal exception of no cause of action were waived," and the attorney for the latter-named company "agreed to try the issue whether that company was lessor, and whether, as lessor, it could be held in any manner for the accident, as raised by his second exception."

Evidence was accordingly heard on these issues. The district judge sustained the second ground of exception filed by defendant, and rendered judgment in its favor and against the plaintiff, dismissing his suit. Plaintiff appealed.

The act by which the Algiers & Gretna Railroad Company was incorporated was not in the record. Mr. Rainold, as witness, states it was incorporated on the 11th of February, 1882, by act before Samuel Flower, notary public; that the original franchise to run a street railroad in Algiers was given, he thought, to a syndicate of about fifteen persons, whom he named; and that they transferred their right to the Algiers & Gretna Railroad Company.

There is no direct evidence in the record showing how or from whom and when that company acquired, or claimed to have acquired, otherwise than through its act of incorporation, the right to operate a railway for transporting freight and passengers outside of the limits of the city of New Orleans beyond and into the parish of Jefferson and over its roads; but there is copied into the transcript an ordinance of the police jury of the parish of Jefferson (but with nothing showing the date of its passage) granting to the same parties, who were named by Mr. Rainold as composing the syndicate to whom the city of New Orleans had made its grant, and to their successors, transferees, and assigns, the right of building and operating, from Algiers, in the parish of Orleans, to the parish line of Jefferson, a track of railroad for the transportation of passengers and freight from Harvey's canal, into the parish of Jefferson, to the lower line of that parish. However this may be, there is no doubt that the Algiers & Gretna Railway Company claimed to have in some way acquired such a right, inasmuch as on the 7th of March,

1893, by act before Frank E. Rainold, it leased for ten years to Thomas Pickles, who was one of the parties named as forming the syndicates referred to, "all the franchises of the Algiers & Gretna Railway Company, including its roadbed, and the right to operate a railway for transporting freight and passengers between the town of Gretna, in the parish of Jefferson, and the Fifth District of the city of New Orleans, formerly known as Algiers, and the tracks as laid between said terminals."

On the 27th of August, 1896, by act before Rainold, Mrs. Henrietta Cook Pickles, wife of Alexander M. Halliday, and Mrs. Josephine E. Harvey, widow of Robert S. Harvey, the heirs of Thomas Pickles, leased the same property, under the same description, to Peter Meid, and, additionally, "the stables and real estate situated on Bouny street, in the Fifth District of New Orleans," together with the cars then used in the operation of said Algiers & Gretna railway, which numbered five, and the entire equipment of the road, for the term of five years, to begin on the 10th day of September, 1897, and to end on the 9th of September, 1902. The lessors simultaneously sold and transferred to the lessee the horses and mules—seventeen in number—they used in the operation of the Algiers & Gretna Company.

On the 23d of January, 1899, by act before Rainold, notary, Peter Meid leased to Anthony Rubrich until the 9th day of September, 1902, the same property, under the same description, which was leased by the Algiers & Gretna Railroad Company to Thomas Pickles; also the stables and real estate in McDonoughville, in the parish of Jefferson; also all the cars used, at the time of this lease to Rubrich, in the operation of the Algiers & Gretna Railway Company, and the entire equipment of the road.

On the 29th of April, 1899, by act before Rainold, notary, Anthony Rubrich sold and transferred to the Jefferson Railway Company "all the rights which he acquired by reason of the notarial contract executed before Rainold, notary, on the 23d of January, 1899, to which contract Peter Meid, Anthony Rubrich, Ella Mills, Mrs. Josephine E. Harvey, and Mrs. A. M. Halliday were parties."

The Jefferson Railway Company was incorporated by notarial act before Rainold, notary, on the 4th of April, 1899. The purposes for which it was incorporated were declared to be: "To acquire by lease the right to operate and maintain a railway system between Algiers, in the parish of Orleans, and Gretna, in the parish of Jefferson; to operate and maintain between said terminals for the transportation of passengers and freight; and more especially to acquire all the right of Anthony Rubrich under the contract made by him with Peter Meid and Mrs. A. M. Halliday, and Mrs. Josephine E. Harvey, which contract was executed before Frank E. Rainold, notary public, on the 23d of January, 1899; and that this corporation shall have the right to acquire such franchises, privileges, and property, both movable and immovable, as shall be necessary for its business or incidental thereto."

Gretna and McDonoughville are unincorporated villages, situated in the parish of Jefferson, the latter between Gretna and the upper line of the

city of New Orleans. The accident occurred in a street of McDonoughville. At the time of the accident the only property owned by the Algiers & Gretna Railroad Company were its franchise and the road tracks of the road between Algiers and Gretna. The railroad between Algiers and Gretna was being operated at that time by the Jefferson Railway over the roadbed and tracks of the Algiers & Gretna Company under its lease, but the car which ran over the child belonged to it, and the driver in charge of the same was one of its employees.

P. F. & W. J. Hennessey, for appellant.

Frank Edward Rainold, for appellees.

Opinion by NICHOLLS, C. J.

The theory upon which the Algiers & Gretna Company claims to have been released from responsibility in the premises is that, under the laws of Louisiana, the franchises and property of a railroad company can be mortgaged and sold, and that the rights granted by the city of New Orleans and by the police jury of the parish of Jefferson to the syndicates mentioned — and which rights that company acquired — were by their express terms assignable in character, and that, being such, the company had the right to make the lease it did; that by so leasing it was released from all obligations resulting from the negligent operation of the road, the leasing company being alone responsible.

They cite in support of their position articles 2317 and 2679 of the Civil Code; *Pierce Railroads*, 283, 284; 23 Am. & Eng. Encyc. of Law (2d ed.), p. 785; *Mahoney v. Atlantic R. Co.*, 63 Me. 68; *Ditchett v. Spuyten*, 67 N. Y. 425; *Norton v. Wiswall*, 26 Barb. 618; *Virginia Midland v. Washington* (Va.), 10 S. E. 927, 7 L. R. A. 344; *Hart v. N. O. & C. R. Co.*, 4 La. Ann. 262; *McDonald v. Railway Co.*, 47 La. Ann. 1440, 17 So. 873; *McConnell v. Lemley*, 48 La. Ann. 1438, 20 So. 887, 34 L. R. A. 609, 55 Am. St. Rep. 319; *Thompson v. Dotterer*, 105 La. 37, 29 So. 483; *Farmer v. Myles*, 106 La. 333, 30 So. 858; *Goodwyn v. Bodcaw Lumber Co.* (La.), 34 So. 74.

The plaintiffs refer to *Morawetz Corp. Law*, 1120; *York & M. Line R. Co. v. Winans*, 17 How. 30, 15 L. Ed. 27; *Railroad Co. v.*

Brown, 17 Wall. 445, 450, 21 L. Ed. 675; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Oregon R. Co. v. Oregonian R. Co.*, 130 U. S. 1-39, 9 Sup. Ct. 409, 32 L. Ed. 837; *Central Transp. Co. v. Pullman Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; *Wyman v. Railroad Co.*, 46 Me. 162; *Middlesex R. Co. v. Boston & Chelsea R. Co.*, 115 Mass. 347; *Braslin v. Sommerville Horse R. Co.*, 145 Mass. 64, 13 N. E. 65; *Davis v. Old Colony R. Co.*, 131 Mass. 258, 276, 41 Am. Rep. 221; *Commonwealth v. Smith*, 10 Allen, 455, 87 Am. Dec. 672; *Railroad Co. v. Whipple*, 22 Ill. 105; *Abbott v. Johnstown R. Co.*, 80 N. Y. 27, 36 Am. Rep. 572; *Freeman v. Railroad Co.*, 28 Minn. 444, 10 N. W. 594; *Macon & A. R. Co. v. Mayes*, 49 Ga. 355, 15 Am. Rep. 678.

Referring to the authorities cited by the parties in 23 Am. & Eng. Encyc. of Law (2d ed.), pp. 784, 785, under the title "Railroads," we find that different rules have been adopted in different jurisdictions as to the effect upon the legal liability of a railroad company, which had made a lease of its road, for the negligent operation of the same by its lessee. The first rule and the line of decisions supporting it are found on page 784 of that work under the heading "Negligent Operation by Lessee—(aa) Rule Holding Lessor Liable."

The second rule and decisions supporting it, on page 785, under the heading "(bb) Rule Denying Liability of Lessor."

Under the first of these headings it is said: "There is a sharp conflict of authority as to whether a lessor of a railroad is liable for injuries to persons or property caused by the wrongful or negligent acts or omissions of the lessee in the operation of the road, so distinguished from the nonperformance of a duty which the lessor's charter or the general law imposes primarily upon the lessor. There is one line of decisions holding that the proper operation of the road so as to avoid injury to third persons is one of the duties imposed by the charter of the proprietary company, and that it cannot escape such duty and the corresponding liability by leasing its road to another, but that the lessor is liable to any person who may be injured by the negligence or wrongful act of the lessee in operating the leased road, unless the charter or statute authorizing the lease exempts the lessor from such liability. The theory of these cases is not that the lessee is to be regarded as the agent or

servant of the lessor, but that public policy forbids a railroad company thus to divest itself of its legal responsibility without legislative authority."

Under the second heading it is said:

"Opposed to the rule just stated is a line of cases holding that legislative authority to lease a railroad implies an exemption of the lessor from liability for the acts of its lessee, and that when a company had leased its road, and the lessee is in exclusive possession and control under the lease, no liability attaches to the lessor for any negligent or wrongful conduct of the lessee or its servants whereby third persons are injured."

We have said that the act of incorporation is not in the record, but the whole course taken in the case justifies us in assuming that it is a street railroad company created legally by notarial act for the purpose of constructing and operating a railroad for the transportation of freight and passengers for the public benefit from Gretna, in the parish of Jefferson, to that portion of the city of New Orleans, parish of Orleans, lying on the right bank of the Mississippi river, known as "Algiers."

When the incorporators of that corporation availed themselves of the general law to create that corporation, they acquired for the corporation so created certain legal rights and privileges. They also bound the corporation to the performance of certain acts, and subjected it and its property to certain duties and obligations in behalf of the general public. The corporation so created became bound to an acquisition of a right of way, and the construction thereon over it of a roadbed and tracks, and the operation of cars upon the same, under such conditions as to properly secure the safety of the general public. It became subjected to *quasi*-public corporation to just and proper legal control and regulation. These were primary obligations on its part, resulting directly *ipso facto* from its incorporation; and from those obligations toward the public it could not free itself purely at its own will by contracts made with third parties. It might be true that, so long as the corporation remained entirely inactive, it could not be forced into the active performance of these duties by way of mandamus, and that the remedy for nonuser would be by way of forfeiture through the State authorities; but when it took action under its act of incorporation — acquired a right of way, constructed a roadbed and

track upon it, and placed the railroad into active operation — it placed itself in a position where it could no longer deal with matters as it might itself think proper, in disregard of the primary obligations which it had come under at and by its creation and in favor of the general public. The various acts of acquisition of property and secondary franchises by the corporation, in necessary aid of the purposes and objects of its creation, impressed upon the rights and property and secondary franchises so acquired, in favor of the general public, certain rights which it was not free to of itself set aside or disregard. The corporation, through these acquisitions, became owners of the property; but by the very tenure of the character of this ownership the public, as well as itself, acquired an interest therein. Its ownership was not in one sense an absolute ownership, giving the corporation an unrestricted power of use and disposition, but an imperfect ownership, where the power of use and disposition were held in check and controlled by the rights of the general public and the obligations of the corporation.

The right of a corporation to acquire property in aid of the objects of the incorporation is not a criterion of the right of the corporation to use and dispose of it. Where the rights of property are successively acquired in aid of the objects of the corporation, they become fused, consolidated, or merged into an entirety to carry out the public purposes for which they were acquired, and the corporation is not permitted thereafter at its own mere volition to separate them and to divert them from those purposes.

Defendant's argument that, because the law allows the property and franchises of a corporation to be mortgaged, and to be sold in foreclosure of the mortgage, it must be taken to have authorized the leasing of the same by the corporation, as the power to mortgage is much the broader and more extensive power of the two, and the maxim that the less is included in the greater applies, is not well founded. The two powers are not in the same line, but are distinct from each other, and it is error to reason from that standpoint. Besides, the precise circumstances under which the property and franchises are authorized to be mortgaged are fixed, and there existed no such condition of things in this case as would have authorized a mortgage, still less a lease.

Defendant urges that the rights which it acquired by transfer from the syndicates were by their terms and on their face as-

signable, and in leasing the road they simply exercised a right granted in their act of purchase of the rights. It is true that, in so far as the city of New Orleans and the police jury of the parish of Jefferson were concerned, they each agreed that the rights and privileges which they consented to in favor of the original grantees could and should pass to their assigns and successors. Possibly the city of New Orleans and the parish of Jefferson might be held to that consent, but we are not dealing now with what both or either of those corporations would have the right to object to in the premises. Again, the consent of the city and the parish of Jefferson that the grant of a right of way for a railroad through the streets of Algiers should inure to the benefit of the assignees or successors of the original grantee contemplated that all of the rights and franchises of the road should pass as an entirety, and in the interests of the public, to those assigns or successors. They agreed to the transmissibility of their consent to them, but not to a divisibility of the franchises. The franchises, rights, and obligations of the Algiers & Gretna Railroad Company as a *quasi*-public railroad were not created by the action of the police jury of the parish of Jefferson. Neither the city of New Orleans nor the police jury of Jefferson could alter rights and obligations which sprang from and were fixed by the lawmakers. The effect of the doctrine contended for by the defendant would be to permit six persons, created a corporation with special rights and privileges, but subjected to special duties and obligations to the public, after acquiring property and placing itself in position to carry out its functions, itself to free the corporation and its property from all liability to the public, and abandon the performance of any of its duties, while owning its franchises and property, by the simple process of making a lease to third parties by a contract which would confer upon the corporation rights against its lessee which would prime any to be acquired by third parties for torts committed by the lessee through the faulty and negligent operation of the road. No such result could have been intended by the Legislature. Rights transmissible or assignable *quoad* one of the parties to a contract are not necessarily so as to the other.

It is a general rule that when a person, whether natural or artificial, has come under obligations to a third person, he cannot free himself from the same by contract by delegating to another the

performance of these obligations, and changing debtors. The present action is not one by which a party holding contractual relations with a lessee seeks to extend the obligations of his contract beyond the person with whom he has contracted over to the lessor, but one *ex delicto* brought by a third party who, prior to the injuries received complained of, was a stranger to the lessee.

In the case of *McConnell v. Lemley*, 48 La. Ann. 1438, 20 So. 887, 34 L. R. A. 609, 55 Am. St. Rep. 319, cited by defendant, there was no corporation involved. The issue was whether a private individual, owning a building which he had leased, could be held responsible for damages caused by the acts of the lessee. The owner of the building is liable to the public under certain circumstances, and when so liable he is not released from liability by reason simply of the property being (at the time that damage complained of was received) under lease. In that case the court was of opinion that the damages received were not due to a violation of the lessor's primary obligation. Had they been, a different result would have been reached. A private individual's obligation to the public is much more restricted than is that of a public railroad corporation. *Goodwyn v. Bodcaw Lumber Co.* presented questions different from those raised here. That company was not a public railroad corporation, but a lumber company owning a logging track road used only in connection with its own business. It did not lease, but sold outright, a part of its property which it did not care any longer to retain the ownership of. Some of the stockholders were inclined to convert the private railroad into a public one by the procuring of public railroad franchises; others were not inclined to do so. The result was that the road in question, being the private property of the corporation, was sold to certain of the stockholders as individuals, who thereupon organized as a public railroad corporation, and were operating it as such when the accident complained of occurred.

We are of the opinion that the judgment appealed from is erroneous, and for the reasons herein assigned it is hereby ordered, adjudged, and decreed that said judgment be, and the same is, hereby annulled, avoided, and reversed, and that the cause be reinstated on the docket of the civil District Court for the parish of Orleans, and this cause be remanded to that court for further proceedings according to law.

Eichorn v. New Orleans & C. R., Light & Power Co.

(Louisiana — Supreme Court.)

1. **DANGEROUS CROSSING; EXTRA PRECAUTIONS.**— If a railroad company, in the management of its traffic, causes unusual peril to travelers, it shall meet such peril by corresponding precautions. So, where the crossing is especially dangerous on account of its locality or mode of construction, or because the view is restricted or the track is curved, it is the duty of the company to exercise such care and take such precautions as the dangerous nature of the crossing requires. If the city council fails to pass ordinances called for by existing conditions, the company should, of its own motion, make a regulation to that effect, and notify their employees; but the latter are held, without notice, to have had knowledge of the visible dangerous conditions, and bound, without specific directions, to take the steps necessary for the public safety.
2. **NEGLECT IN NOT TAKING PROPER PRECAUTIONS.**— Where trainmen have reason to believe there are persons in exposed positions on the tracks, as over unguarded crossings in populous districts in cities, or where the public are wont to cross with such frequency and numbers as to be known to them, they will be held to a knowledge of the probable consequences of not taking proper care and precautions, and their employees will be responsible for injuries received in consequence thereof, notwithstanding there was negligence on the part of the person injured, and no fault on the part of the servant after seeing the danger.

Care at dangerous street crossings.— At a street crossing a street car has no paramount right of way over vehicles and pedestrians; the car has a right to cross, and must cross the street; and a vehicle or pedestrian has the right to cross and must cross the railroad track. The right of each must be exercised with due regard to the right of the other, in a reasonable and careful manner, and so as not unreasonably to abridge or interfere with the rights of the other. *O'Neil v. Dry Dock, etc., R. Co.*, 129 N. Y. 125, 130, 29 N. E. 84. The railroad company must recognize and respect the equal rights of all others, and cause its servants who operate the cars to exercise the care which the increased danger arising from the travel at street crossings demands, and others using the street must take all reasonable and proper precautions to avoid accidents. *Nellis Street Railroad Accident Law*, p. 270. See also *Strutzel v. St. Paul City R. Co.*, 47 Minn. 543, 59 N. W. 690; *Winters v. Kansas City Cable Ry. Co.*, 99 Mo. 509, 12 S. W. 652; *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459, 22 N. E. 1062 (holding that a street railway company has no right to so occupy the street and use the same with its cars as to make it extremely dangerous to cross the street at all times).

Person injured while standing at crossing between double tracks.— A person is not guilty of contributory negligence as matter of law, who, while standing

3. **STANDING BETWEEN DOUBLE TRACKS.**—The general public are not called upon to know or take in at a glance that the space between parallel tracks in a city is not wide enough to afford protection to persons standing on that space, or to know the length and width of the cars used upon the road. A person has the right to assume that the width is sufficient, and to assume that it was not likely that two cars would pass each other, moving, while he was in that position.

(Syllabus by the court.)

APPEAL by defendant from judgment for plaintiff. Decided February 20, 1904. Reported 112 La. 236, 36 So. 335.

Dart & Kernan, for appellant.

George Joseph Untereiner and *Benjamin Rice Forman*, for appellee.

Opinion by NICHOLLS, C. J.

The plaintiff, as widow of Ludwig Eichorn, seeks in this action to recover from the defendant the sum of \$50,000, with legal interest, because, as she alleged, through its negligence, unskillfulness, and want of care in laying its tracks on Baronne near Canal street, and operating its cars at said place on the 29th of January, 1902, it killed her husband, who was lawfully upon the public streets at that place, and without fault or negligence on his part.

She alleged in her petition that the tracks were laid at the place for much narrower cars, and, since the tracks were laid, the said

on a crosswalk in the space between two lines of tracks of a street railroad, waiting to board a south-bound car, then at the other crossing of the street in which he is standing, is struck by a north-bound car, which, at the time he took this position, he saw standing a block away, and which he did not look at again, where the driver of a north-bound car, although he could see the situation, failed to obey the rule of the company requiring him, under such circumstances, to reduce the speed of his car, or stop. *Boentgen v. N. Y. & H. R. Co.*, 36 App. Div. (N. Y.) 460, 55 N. Y. Supp. 847. A person standing in the narrow passageway between tracks, from which passengers are accustomed to board cars, for the purpose of boarding a car then on the track, has the right to assume that he will not be injured by an incoming car on another track, and a slight inattention on his part should not relieve the company from liability for the negligence of a motorman; such a person struck by an electric car coming up from behind does not come within the rule requiring one to look and listen. *Conway v. New Orleans, etc., R. Co.*, 51 La. Ann. 146, 24 So. 780.

company had bought and operated, and did on the 29th of January, 1902, operate at that place, cars much too wide for the space between the tracks — a fact unknown to Ludwig Eichorn, and not noticeable by an ordinary observer, but which, in the interest of the public safety, and with its engineers and instruments of precision, operating electric cars through the populous streets of this city, it was bound to know and guard against, and a reasonable care for the lives of the people required it, when it adopted the wider cars, and made it the duty of the company, to increase the space between the tracks.

(2) It was negligent in the selection and employment of youths, too youthful and inexperienced, and careless motoneers in the operation of its cars, which caused the death of Ludwig Eichorn.

(3) On the day in question he was crossing Baronne street at the usual place, near Canal street, and his way was stopped by a car standing across the passage, and while he was standing in what appeared to be a perfectly safe place, waiting for the car which obstructed his passage to go forward, another car of said defendant company, coming in the opposite direction, carelessly and negligently, and without warning of its approach, and when the motoneer ought to have waited until the other car had passed, came on, and rolled and crushed the said Ludwig Eichorn between the said two cars, when he was not on the track of either, but between the two, where he had a right to be, and to suppose he was perfectly safe.

Culpable negligence may be inferred from the action of a gripman in running a street car in a city at a rapid, but not unlawful, speed, past a street crossing at which a car on another track bound in the opposite direction is discharging passengers, whose view of the approaching car is necessarily obstructed. *Chicago City Ry. Co. v. Robinson*, 127 Ill. 9, 18 N. E. 772, 11 Am. St. Rep. 87, 4 L. R. A. 126.

A person who, while standing between the double tracks of a street railway, where there is sufficient room to insure her safety from cars passing in either direction, and, being intent on observing a car coming from one direction, steps back in front of another car, coming from another direction, and only ten or fifteen feet away, without observing it, and is struck and injured, is guilty of contributory negligence, and cannot recover. *Bailey v. Market St. Cable R. Co.*, 110 Cal. 320, 42 Pac. 914.

See also *Mulligan v. Third Ave. R. Co.*, 2 St. Ry. Rep. 792, 89 App. Div. (N. Y.) 207, 85 N. Y. Supp. 791.

The motoneer ought herein to have been warned by the officers of the danger of rolling a car at that place alongside of one on the separate parallel track, which had not been done, or done, he negligently disregarded the safety of Ludwig Eichorn.

The said company could have prevented the injury, and did not do so. Ludwig Eichorn was so crushed by the said two cars that he suffered great pain in body and mind for two days and then died. Five thousand dollars is claimed for his own sufferings, and \$45,000 for petitioner's loss of his comfort and support. He was, previous to his negligent killing by defendant, in good health, and had a life expectancy of forty years, and his earnings were about \$3,000 a year. In view of the premises, petitioner prayed that the said New Orleans & Carrollton Railroad, Light & Power Company be cited to appear and answer, and be condemned to pay petitioner \$50,000 damages, with 5 per cent. interest from judicial demand, and for costs, general relief, and trial by a jury.

Defendant excepted that plaintiff's petition was vague, general, and indefinite, and disclosed no just and legal cause of action, and the suit should be dismissed. The exceptions were overruled.

The defendant then answered, pleading first the general issue. It denied that it was in any way liable for the injuries alleged to have been received by the husband of plaintiff, and averred that, if plaintiff's said husband was injured, as claimed in the petition, it was not through the fault and negligence of respondent, or any of its agents, servants, or employees, but, on the contrary, was entirely through the fault, negligence, and gross want of care of the plaintiff's said husband; but in the event it should be shown there was a question of negligence, respondent pleaded that the said husband was guilty of contributory negligence.

Plaintiff, with leave of the court, filed a supplemental petition in which she alleged that she had been informed and believed, and so averred, that since the filing of her suit the New Orleans Railways Company, a corporation doing business in this city, had acquired all the property of the New Orleans & Carrollton Railroad, Light & Power Company, and had assumed all of its liabilities, among which was petitioner's right to damages.

That she reiterated and reaffirmed all the allegations of her original petition herein filed.

She prayed that the New Orleans Railways Company be cited; that petitioner have judgment against it *in solido* with the New Orleans & Carrollton Railroad, Light & Power Company, with 5 per cent. interest per annum from judicial demand, and costs, and for general relief.

The court ordered the New Orleans Railways Company to be made a party defendant and cited.

The case was tried before a jury, which returned a verdict for plaintiff in the sum of \$25,000, with legal interest from judicial demand.

Defendant unsuccessfully applied for a new trial.

The court rendered judgment upon the verdict and in favor of the plaintiff against the New Orleans & Carrollton Railroad, Light & Power Company for the sum of \$25,000, with legal interest from judicial demand, and defendant appealed.

In 110 La. 534, 34 So. 667, will be found reported the case of *Schwartz v. New Orleans & C. R. Co.*, an action sounding in damages against the defendant in that case for injuries received by the plaintiff by being caught and crushed between two cars which were being operated by the defendant company on Baronne street, in New Orleans, near its intersection with Canal; the cars moving in opposite directions on distinct tracks. The facts of the case are fully set out, and a diagram showing the situation of the railroad tracks at and near the spot where the injury was received will be found annexed to the opinion of the court. The injury to Ludwig Eichorn which resulted in his death, and which gave rise to the present litigation, was received by him at the same place, and under very similar circumstances. The defendant company operates electric cars from a point on Canal street near the Mississippi river to Baronne, and thence up Baronne street to the upper part of the city. The company has double tracks on the neutral ground on Canal street and also double tracks on Baronne street. The connection of the tracks upon these two streets is made by curved tracks crossing Canal street at Baronne. One of the company's tracks on Canal is on the upper or right-hand side of the neutral ground as one faces the Mississippi river, and the other on the lower side of the neutral ground. The cars conveying passengers from the upper part of the city pass down upon the right-hand

track on Baronne street, cross Canal street on a sharp curve to the upper side of the neutral ground on Canal, and pass on to the end of the line, near the river. At that point they cross to the track on the lower side of the neutral ground, and pass toward the rear of the city upon that track, until they reach Baronne. They then cross Canal street upon a wide curve to the intersection of Baronne and Canal streets, and proceed to the upper part of the city on the track opposite to that on which they had gone down.

The curved tracks by which the tracks on Baronne street connect with those on Canal street begin upon the crossing at the intersection of these two streets, upon which pedestrians cross from one side of Baronne street to the other. Baronne at that point is one of the busiest streets in the city. Hundreds of persons, if not thousands, cross there each day, and the street there is frequently blocked by vehicles. The tracks on Baronne street, even when they are parallel to each other, are too close together to enable a person to stand safely upon the space between the two, and, should a person be standing at the point where the curves upon the crossing commence at the time when two moving cars pass each other there, he would meet with almost certain death, as, in passing, the ends of the moving cars swing toward each other, and block the way up upon the upper side.

The tracks, when they were laid, were, even with the cars then in use, traps, to all persons not having knowledge of the exact situation; and the danger had been made much greater for several years past than it was before, as wider and longer cars have been substituted for those formerly used.

A street railway company accepting a franchise to operate cars upon tracks so dangerously laid at points very menacing to human life was bound to know of the risks it was assuming, and the duties and burdens it was taking upon itself. It is no answer for it to say that it could not control the city officers and authorities in its placing of the tracks. There was no obligation on its part to engage in the business at all, and, if it thought proper so to do, in view of and in spite of the attendant responsibilities, it could not avoid the legal consequences of a failure on its part to meet the requirements resulting from the exact situation. Not only was the company itself held to a knowledge of the dangerous situation

of affairs, but the conductors and the motormen upon the cars were also bound to know this. It required no notice to them from the officers of the company of this fact, for this matter was constantly and directly before their eyes. The danger of the situation in respect to this crossing had been additionally demonstrated and brought home to the company by the accident to Schwartz. In the Schwartz case this court quoted approvingly from Elliott Roads & Streets (2d ed), pp. 856, 791, to the following effect: "If a railroad company, in the management of its traffic, causes unusual peril to travelers, it should meet such peril by corresponding precautions. So, where the crossing is especially dangerous to travelers, on account of its locality or mode of construction, or because the track is curved or the view obstructed, it is the duty of the company to exercise such care and take such precautions as the dangerous nature of the crossing requires."

Proceeding, this court said: "The danger [in that case] might have been avoided, without material impairment of the sufficiency of the car service, by simply not permitting the cars to meet on the crossing, and it was incumbent upon the defendant to do so. See, in this connection, *Summers v. Railroad Co.*, 34 La. Ann. 145, 44 Am. Rep. 419. That there is danger to the public in permitting the cars to meet at this crossing, the present case and another one before the court but too sufficiently attest. Defendant should have known of this danger, and guarded against it. He who creates a danger upon or near a public highway must see to it that no harm results therefrom to the public." Whart. Neg. 839; 1 Thomps. Neg. 346.

Notwithstanding this positive announcement by the court as to what was legally required of railroad corporations for the protection of the public at this very crossing, no steps whatever seem to have been taken toward the performance of defendant's plain duty in the premises. No instructions were given to its subordinates on the subject, and they were left free to follow their own ideas as to what was proper or necessary to be done.

If the defendant company was of the opinion that its duties to the public went no further than compliance with positive existing statutes or ordinances, it was mistaken. In *Lampkin v. McCormick*, 105 La. 422, 29 So. 952, 83 Am. St. Rep. 245, we said:

"It may be that these obligations were not imposed by general ordinances or statutes, but there are certain obligations imposed upon railroad corporations independently of convention or ordinance or statute. There is a duty imposed upon every one, whether natural persons or artificial persons, to avoid, by proper care, doing injury to others through their fault." And in *Sundmaker v. Yazoo & Mississippi Valley R. Co.*, 106 La. 116, 30 So. 285, this court declared that, if the city council failed to pass an ordinance called for by existing conditions, "the company should have, of its own motion, made a regulation to that effect; that it was in fault in not having done so, and must abide the consequences."

It is error to suppose that trainmen operating cars have no duties to perform, other than those as to which they have received specific directions. They are required to do whatever the necessities of a particular situation or condition legally demands, whether they have received instructions or not; and, as said in *Downing v. Morgan's La. Ry. Co.*, 104 La. 519, 29 So. 207, the precautions to be adopted and the steps to be taken in aid of safety increases as the danger of accident and injury increases, and their sufficiency is to be gauged by what is called for by the special circumstances of each case."

In *Ortolano v. Morgan's La. Ry. Co.*, 109 La. 911, 33 So. 917, this court said: "Where trainmen have reason to believe that there are persons in exposed positions on the track, as over unguarded crossings in populous districts in a city, or where the public are wont to cross on the track with such frequency and numbers as to be known to those in charge of the trains, they will be held to a knowledge of the probable consequences of maintaining great speed without warning, so as to impute to them reckless indifference in respect thereto, and render their employees responsible for injuries therefrom, notwithstanding there was negligence on the part of the injured, and no fault on the part of the servant after seeing the danger."

We now pass to the facts of the case, and premise by saying that, at the point at which he was standing when injured, Eichorn was neither a trespasser nor a licensee. He was in the public streets of the city, and had a legal right to be where he was. *Lampkin v. McCormick*. On the morning of the 29th of January, 1902,

Eichorn started to cross from the wood side to the river side of Baronne street at its intersection with Canal street. He started across the street almost at the same moment that one Geoghehan did so, Eichorn being upon the latter's right. At that moment there was a car, which we will refer to as the "outgoing car," upon the river-side track of Baronne street. It was then either at rest, discharging its passengers, with its front immediately above the foot crossing of Baronne street, or it was just starting or had just started to move out onto Canal on its way to the river. At this same time a car of the same company, which will be referred to as the "incoming car," was crossing Canal street on its way uptown through Baronne street. Geoghehan and Eichorn both passed in front of the latter car without injury. The incoming car did not stop in consequence of their crossing in front of it. According to the motorman's own account, he only checked up, and at once put the power on again. It is true that it was soon after this brought to a standstill, but only after Eichorn had received his injury. Geoghehan and Eichorn, upon reaching the space intervening between the two tracks, found that they would be unable to cross over the second track, for the reason that the outgoing car had already started down the track, and was so close upon them as to have made it dangerous to pass in front of it. Both, therefore, stopped. In the meantime the incoming car, moving up, passed to the rear of the two men. After the two cars passed each other, the front end of the incoming car and the rear end of the outgoing car swung across the space between the two tracks, closing it up so closely that the only exit which could be made at that time from parties between the two cars was by moving rapidly toward Canal street. The space between the cars widened as the curves extended into Canal street. Geoghehan, being on the left of Eichorn, and the nearer to Canal street, occupied a position where the interval between the tracks was wider than was the space in which Eichorn found himself.

Believing the space between the tracks sufficiently wide for safety, Geoghehan remained standing where he was, and escaped injury. In his testimony he says that he was not squeezed, but it was very close. Eichorn, being to his right, on a narrower space,

was rolled along between the cars, and his ribs crushed in to such an extent that in two days he died.

We have before us a model representing the condition of things at the place where the accident occurred, corresponding to the diagram which is attached to the opinion of this court in the Schwartz case. Very considerable testimony was adduced to show upon the model the precise spot at which Eichorn was standing when the cars passed him, but we do not consider the fixing of that precise spot, under the circumstances of this case, to be as important as defendant's counsel think it was, for Eichorn had the legal right to have been either at the point where the plaintiff claims he was, or at that point at which defendant seeks to place him; and, as matters shaped themselves, the injury was as certain to occur to him at one place as the other. The two cars had no more right to throw him between them in the space between the tracks by moving past each other at one point than at the other. *Downing v. Morgan's La. Ry. Co.*, 104 La. 522, 29 So. 207.

The direct, immediate cause of the injury to plaintiff's husband was the fact of the two cars of the defendant company moving simultaneously — one before and the other behind him — while he was standing in the very narrow space between the two tracks. The cars unquestionably met and passed each other on the foot crossing. This could not have been done without culpable negligence. The outgoing car was brought to a standstill after Eichorn got between the two cars by the emergency signal given by its conductor, and the other car was brought to a halt by the action of its motorman himself. The latter says he saw Eichorn "pass" his dashboard, and soon after, hearing him moan, he looked out, and saw him at the side of his car, and between the two cars. Unquestionably Eichorn disappeared from opposite the dashboard of the incoming car, but this was not because he moved to the left, but because that car, moving forward, passed up to and beyond him. Not a witness testified that either Geogehehan or Eichorn, prior to the accident, shifted their respective positions between the tracks from what they had been originally.

The two cars could not have occupied the positions which they did, relatively to each other and to Eichorn, on the space between the two tracks at or near the foot crossing, without fault on the

part of defendant's employees. That condition of affairs cannot be explained away. Having reached the conclusions we have as to there being fault on the part of the defendant company, we have to inquire whether there exists any fact which it can set up which would relieve it from liability therefor. Defendant urges contributory negligence on the part of Eichorn, but we have failed to find any act of his which could be chargeable with being negligent. That question was thoroughly discussed in the Schwartz case, and the same reasons which absolved Schwartz from the charge of negligence absolve Eichorn. He was clearly not chargeable with negligence in passing into the open space between the two tracks before the incoming car, for he passed across in safety, and negligence, so far as that act is concerned, does not enter as a cause of injury at all as a factor in the consideration of the case. *De Mahy v. Morgan's La. Ry. Co.*, 45 La. Ann. 1342, 14 So. 61; *Schwartz v. Railroad Co.*, 110 La. 619, 34 So. 709. Being once upon the open space between the tracks, he could not have acted in any other manner than he did. He was perfectly passive, and the accident to him resulted by the two cars moving negligently, one in front of and the other behind him, so that he could not have possibly escaped. Geoghehan barred the way to the left, and the space to the right was closed.

As one of the general public, he was not called upon to know or to take in at a glance that the space between the two tracks was not wide enough to afford protection to a person standing upon it, or to know the length and the width of the cars used upon the road; and, if he had known that the position was dangerous, he had the right to assume that the company's employees did know, and one or other of the cars would stop before reaching him.

We now pass to the *quantum* of damages. Eichorn had five ribs broken and crushed into his lung. He died in two days. Defendant says that during that period he was insensible. If there be testimony to that effect, it has escaped us. His wife testified he groaned constantly and suffered greatly. He earned from \$200 to \$250 a month. He was thirty-nine years of age and in good health, and his expectancy of life was about twenty-eight years.

He left seven children, all minors. Plaintiff insists that the amount of the verdict was far too small an amount, and, by answer

to the appeal, prays for an increase in the amount. The present suit is brought on behalf of the widow. Defendant's counsel inform us that a second suit, claiming damages for a like amount, has been brought on behalf of the children.

No objection or exception was made to this course. We think it proper to say we do not think the lawmakers intended that there should be distinct suits before different juries, but that all the issues involved should be presented and disposed of at one and the same time.

We think the judgment in favor of the plaintiff on the merits is correct, but that the amount of damages allowed is too large, and that it should be reduced to \$10,000.

For the reasons assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the amount awarded to the plaintiff to \$10,000, and, as amended, it be affirmed; appellee to pay the costs of appeal.

Whitworth et al. v. Shreveport Belt Railway Co.

(Louisiana — Supreme Court.)

INJURY TO EMPLOYEE OF TELEPHONE COMPANY BY SHOCK FROM ELECTRIC TROLLEY WIRE.—Potts and Whitworth, employees of the telephone company, were engaged in stretching a line of that company upon its poles. In doing so, the line had to be passed above a span of the electric car system. Potts, upon the telegraph pole, was holding one end of the wire, while Whitworth, upon the ground, was holding the other. The latter, stumbled, and in doing so dropped his end of the wire, which fell to the ground, resting upon the span wire below, which, by reason of

Injury to employee of one company by contact with electric wires of another. — It is the duty of an electric company to use due care in the stringing of its electric wires of dangerous voltage across and along the streets of a city, regardless of the existence of other wires, of the possibility of contact therewith, of the generation of high tension from its wire, and mindful that such other wires from time to time might require the attention of linemen and other workmen in the matters of repair, readjustment, clearance, insulation, and restoration of their normal functions. If wires are strung so as by sagging or other and ordinary causes to come in contact with the wires of other companies, the company stringing such wires may be found guilty of negligence.

defective insulation in the hanger by which the trolley wire and the span wire were connected, was heavily charged with electricity. Potts, holding the other end of the wire, instantly received a shock, and fell head foremost, but his spurs caught on a spike on the telephone pole, and he hung suspended in the air. Whitworth ran to his relief, and, catching hold of the wire of his own company, which he had been using, to do so, he himself was instantly killed. Held, that Whitworth, in going to the rescue of Potts, was not in fault, but was acting under a high sense of moral duty, and for his death while engaged in performance of that duty, occasioned by the negligence of the electric company, it is responsible in damages. *Corbin v. City of Philadelphia*, 195 Pa. St. 461, 45 Atl. 1070, 49 L. R. A. 715, 78 Am. St. Rep. 825; *West Chicago Street R. Co. v. Liderman* (Ill.), 58 N. E. 367, 52 L. R. A. 655, 79 Am. St. Rep. 226; *Becker v. L. & N. R. Co.* (Ky.), 61 S. W. 997, 53 L. R. A. 267.

(Syllabus by the court.)

APPEAL by defendant from judgment for plaintiffs. Decided February 29, 1904. Reported 112 La. 363, 36 So. 414.

Statement of facts by NICHOLLS, C. J.

This action is brought by Mrs. Carrie E. Nola Whitworth, the widow of P. B. Whitworth, in her own behalf, and by Lester Allen Whitworth, the minor son of P. B. Whitworth, represented by his guardian, G. W. Prewitt. A judgment is prayed for in favor of each of the plaintiffs for \$15,000.

It is alleged that P. B. Whitworth, the husband of one of the plaintiffs, and the father of the other, was killed on August 1, 1901, in the city of Shreveport, by an electric shock communicated to his body from the electric wires of the Shreveport Belt Railway Company; that his death was solely due to its utter and wanton negligence in operating a street railway by means of an overhead wire on Texas avenue, without proper insulation,

Payne v. Elec. Ill. & P. Co., 7 Am. Electl. Cas. 651, 64 App. Div. (N. Y.) 477, 72 N. Y. Supp. 279; *Witleder v. Citizens' Elec. Ill. Co.*, 7 Am. Electl. Cas. 581, 62 N. Y. Supp. 297; *Dwyer v. Buffalo General Elec. Co.*, 7 Am. Electl. Cas. 456, 20 App. Div. (N. Y.) 124, 46 N. Y. Supp. 874; *Clark v. Nassau Elec. R. Co.*, 6 Am. Electl. Cas. 234, 9 App. Div. (N. Y.) 51, 41 N. Y. Supp. 78. See also *Economy L. & P. Co. v. Sheridan*, 8 Am. Electl. Cas. 795, 200 Ill. 439, 65 N. E. 1070, in which the evidence was held sufficient to warrant a finding that an electric light company was negligent in maintaining its electric light wires in an uninsulated condition at a place where the linemen of a telephone company would be likely to come in contact with such wire. As to injuries of employees of one company caused by defectively insulated wires of another company, see note, 8 Am. Electl. Cas. 798. The cases of *Knowlton v. Des Moines Edison Light Co.*, 8 Am. Electl. Cas. 800, 117 Iowa, 451, 90

and permitting defective insulations of the trolley hangers to remain in such condition that the current freely passed to the span wire, and thus communicated with the telephone wire, which said Whitworth was engaged in stretching on poles parallel to the said railway company track, and by the shock from which Mr. Potts, who was on the telephone pole, forty feet from the ground, was shocked and killed. Plaintiffs showed that in the effort to save the life of Potts, who was hanging helpless on the telephone pole as a result of a shock from an electric current transmitted to the telephone wire from the span wire of defendant company, said P. B. Whitworth received a shock which caused him intense agony and pain, and resulted in his death; that said P. B. Whitworth attempted to pull the wire from the body of Potts when he received the shock. They showed that said P. B. Whitworth was a young man, twenty-four years of age, earning fifty dollars per month, supporting his wife and child; that by the reckless indifference of the said railway company to the safety of the public, and their wanton negligence, Carrie Whitworth and Lester Allen Whitworth were deprived of the support of their husband and father.

That the pain and agony of P. B. Whitworth before death, after receiving the electric shock, was intense; that said P. B. Whitworth was without fault; and that his death was due entirely to the wanton negligence of defendant company.

In view of the premises, they prayed for service of citation and petition on said Shreveport Belt Railway Company, through its president, Walter B. Jacobs, to answer to the demand of Mrs. C. E. N. Whitworth for damages for the pain and suffering, death, and loss of support of her husband, P. B. Whitworth, by said defendant company, in the full sum of \$15,000, and the demand of George Prewitt, guardian of Lester Allen Whitworth, son of P. B. Whitworth, for damages to said minor in the full sum of \$15,000 in the pain, suffering, and death, and loss of support, occasioned to said minor by the careless killing of his father by said defendant company, and for all necessary orders and general relief.

The defendant pleaded the general issue. Further answering, it averred

N. W. 818, and Cumberland Telephone & Telegraph Co. v. Ware's Adm'r, 8 Am. Electl. Cas. 811, 24 Ky. Law Rep. 2519, 74 S. W. 289, are similar in effect and in principle to the case last cited. See also *Kennealy v. Westchester Elec. Ry. Co.*, 1 St. Ry. Rep. 639 (and note), 86 App. Div. (N. Y.) 293, 83 N. Y. Supp. 823.

In the case of *Atlanta Cons. St. Ry. Co. v. Owings*, 6 Am. Electl. Cas. 271, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798, the plaintiff's intestate was an employee of a telephone company, and was killed by a current of electricity emanating from a feed wire used by the defendant electric railway company which came in contact with a wire belonging to the employer of such intestate; the electric railway company was held liable for the injury. See also *Jackson & Sub. St. R. Co. v. Simmons*, 8 Am. Electl. Cas. 834, 107 Tenn. 392, 64 S. W. 705.

that if the alleged company or its employees were guilty of any negligence, and that if the appliances used by it were defective in any way, which was denied, P. B. Whitworth was guilty of contributory negligence which resulted in his death, and he cannot recover.

It was agreed between counsel that the evidence taken in the suit of *Mrs. Birdie Potts v. Shreveport Belt Ry. Co.* should be used on the trial of this cause, with the right of either party to introduce other evidence.

The jury returned a verdict against the defendant in favor of Mrs. Carrie E. Whitworth for \$3,500, and against the defendant in favor of Lester Allen Whitworth for \$2,500.

Defendant appealed.

This case is the sequel of that of *Mrs. Birdie Potts v. Shreveport Belt Ry. Co.*, reported in 110 La. 1, 34 So. 103, in which the plaintiff recovered a judgment against the defendant for damages resulting from the death of her husband through its negligence. The following facts are extracted from the report of that case: When Potts was killed he was in the employ of the Cumberland Company, as foreman of a line gang, in stringing its wires upon the poles of that company. In stringing the wires, Potts had with him two assistants, Whitworth and Holt, also in the employ of the telephone company. Under a franchise granted by the city of Shreveport, the defendant company was operating a double-track electric railway on Texas avenue, in that city. It was the overhead trolley system. There was a trolley wire over each track. They were suspended by wires spanning the street, called "span wires." These were attached to wooden poles placed opposite each other on the two sides of the street. The trolley wires were made fast to the span wires by means of what are called "hangers" or "ears." These hangers should be insulated, the purpose being to confine the current of electricity which propels the cars to the trolley wire. Were it otherwise, each span wire would be a "live" or "hot" wire, charged with the same voltage of electricity that the trolley wire had. This would result in so much leakage of the electrical current as to impair its efficiency in the work of operating the cars, and would, besides, render each span dangerous. The Cumberland Telephone Company, also, under a franchise from the city of Shreveport, was occupying the sides of Texas avenue with its poles and wires. On crossarms attached to its poles it maintained and operated numerous wires on and along the streets.

The electric current with which telephone wires are charged is too weak to be dangerous to human life, but the current with which the trolley of the car company is charged is of deadly potency. Potts' death was occasioned by the telephone wire he was stringing coming in contact with a span wire of the car company.

This span wire, notwithstanding its connection with the trolley wire, should have been, through proper insulation, harmless. But it was not. It was deadly dangerous. The insulation at the hanger or ear was gone, if it had ever existed, and the wire was "alive" with likely the same voltage of electricity as was passing over the trolley. This being so, the in-

stant the telephone wire touched it, one end of the wire being on the ground, thus completing the circuit, it (the telephone wire) became likewise charged with the deadly current. At the time Potts was killed, he was up on the pole to which the wire was to be strung. In close proximity was the span wire of the defendant. That it was heavily charged with electricity, there was no doubt. The death of Potts attested this fact. That it was so charged was due to the fact that it had no insulation to protect it from the trolley wire. The wire Potts was stringing had been passed over the span wire. This had been accomplished by means of a rope. Whitworth was westward of the pole Potts was upon. Under instructions from Potts, he was (on the ground) pulling the wire which was being strung. This pulling of the wire kept it taut, and while taut it was free from contact with the span wire. But Whitworth stumbled, and this circumstance caused a slackening of the wire. This slackening of the wire brought it in contact with the span wire, and immediately it became charged with the deadly current. So deadly was the current, that, when Potts was shocked, and hung suspended, and Whitworth, rushing up to the end of the wire, and, touching the ground in the generous effort to pull it away from Potts, seized it, he was himself instantly killed. This court held in the Potts case that the defendant was negligent, and rendered judgment in favor of the plaintiff against it. We are called on to determine whether the plaintiffs in this case are entitled to damages for the death of Whitworth.

Defendant's counsel, in their statement of facts, referring to the Potts case, say: "It will be remembered that Potts, with Holt and Whitworth, were engaged in stringing a telephone wire along Texas avenue, in the city of Shreveport. At the time of his death, Potts was at the top of a pole, endeavoring to place the wire above the span wire of the defendant company. Whitworth, on the ground, had hold of one end of the telephone wire, pulling the wire, when he stumbled, letting go the wire, when it fell on the span wire, which was charged with electricity from the trolley wire, occasioned from defective insulation. It seems that Potts fell and died the moment Whitworth stumbled and let go the wire."

The admissions so made as to the negligence of the defendant company bring the issues involved in this case within very narrow compass. It is conceded on both sides that, as soon as Potts received from the telephone wire the electric shock by which he was killed, he immediately fell head downward from the point where he was standing, and, his spurs catching upon one of the spikes on the pole, remained suspended in the air, and that Whitworth, after stumbling and losing hold of his end of the telephone wire, took hold of it again, and was instantly killed.

The plaintiffs urge that in so doing he could not be held guilty of negligence, as his act was in aid of an attempt to save the life of his companion and fellow workman, Potts, and any others who might incautiously come in contact with the telephone wire, which was hanging suspended from the span wire.

Defendant contends that it was evident to all who witnessed the unfortu-

nate occurrence that Potts was dead when Whitworth caught hold of the wire, and fell dead instantly; that when Potts received the electric shock, and fell from the top of the pole, head down, hanging by his spurs, Holt (one of his assistants) realized that he could do nothing for him but to begin preparations for his interment; that, when he started to ring for assistance to take Potts down, he warned Whitworth not to touch the wire, then down in the mud; that the action of Whitworth was not to save human life, for Potts was manifestly dead several minutes before he took hold of the wire; that others saw it, and he must have seen it, and, moreover, he was warned not to touch the wire by several persons; that, in disregard of this warning, Whitworth, a telephone lineman himself, caught hold of the wire and dropped dead; that his conduct was rash, and recovery cannot be had in the case; that the doctrine held by Rorer on Railroads is to the effect that "it is not a wrongful act to make an effort to save a human life if the effort made be compatible with a reasonable regard for one's own safety;" that the same doctrine is announced in 2 Thomps. Neg., p. 1174, § 21, and in *Peyton v. Pacific Ry. Co.*, 41 La. Ann. 861, 6 So. 690, 17 Am. St. Rep. 430.

Counsel of plaintiff, on the other hand, contend that Whitworth met his death in the attempt to rescue one who was in imminent and deadly peril through the negligence of the defendant; that the spectators were thrown into a state of great excitement by the horrible sight; some hastened to telephone the power-house to turn off the current; some cried out, "Cut the wire;" others, "Don't touch the wire;" that Whitworth, seeing his comrade in that horrible predicament, sizzling and frying to death, and hanging head down forty feet in the air, attempted to cut the telephone wire, and was killed. Counsel say: "Defendant company adopts the only possible defense open to it—that Whitworth was grossly reckless and imprudent; that his widow and child should be denied damages for his death. It has been held that it must be an extreme case to justify refusing damages in a matter of this nature on the ground of the recklessness of the rescuer. This is based on the theory that it is frequently impossible to rescue one in imminent peril without sharing in the danger. It has been further held that due allowance must be made for the excitement caused by the sight of a fellow creature losing his life, and that the danger must not be measured after it is passed, by one who was not present, in apothecary's scales, to determine whether the rescuer exposed himself to more danger than was prudent."

What can be more dangerous than to throw one's self in front of the wheels of a rapidly approaching train? Yet this court, in *Peyton v. Railway Co.*, 41 La. Ann. 861, 6 So. 690, 17 Am. St. Rep. 430, refused to hold that his efforts to save another were so rash, under such circumstances, as to debar his recovery, saying that the appreciation of the value of human life was so great, and the admiration for heroism so universal, that we know of no case where the court had withheld damages under circumstances like that before it. Counsel say:

"The judgment in the case at bar might be well based on the principle that in such a case the rescuer is attempting to save the company from the consequences of its own negligence, and it is not for the company to theorize as to how it might have been done more prudently and with less danger.

"Had Whitworth been successful in rescuing his friend, the defendant would have reaped the benefit of his act. He failed, and lost his own life, and it strikes us that it comes with poor grace from the defendant to say he was negligent, and should not have acted with imprudence. There was intense excitement at the place of the accident. The wires were lying loose in a public street, and the excited citizens were crying, 'Cut the wire,' and others, 'Don't touch the wire;' and, in the midst of these exclamations, Whitworth attempted to cut the wire, either for the purpose of saving his friend Potts, or to attempt to get it out of the street, and was himself killed. There was no time for reflection. There was no opportunity for deciding the best course to pursue, and he acted on the moment in the way to him seemed best. According to defendant's counsel, Whitworth should have differentiated between the extreme danger which, under the cases, he could risk, and the imprudence which he must avoid.

"That others thought there was a chance to save Potts is shown by the fact that they telephoned defendant's power-house to turn off the current, and still others advised the cutting of the wire. It all happened in less time than it takes to tell it. Under such circumstances, what was more natural than for the deceased to attempt to cut the wire? Admitting that there was great danger in the attempt, still there was a chance that it might be done without being injured, and it might have saved the life of his companion. As long as there was a chance to save human life or to prevent injury to others, no court will say that he was recklessly imprudent, particularly against him whose negligence was responsible for the situation.

"If there was excitement, and, through panic and fear, reason had lost its proper sway, this excitement was caused by the defendant's negligence, and that, then, would be the primary cause of the accident, and it would still be liable. See *Thomps. Neg.*, § 197, for a full exposition of the law. This author says: 'If A. acts erroneously under the influence of a sudden impulse of fear, or in consequence of a sudden appearance of danger, caused by the negligence of B., A. may recover damages of B., although, if A. had not so acted, he would not have been hurt.'

"This court, in the case of *Potts v. Railway Co.*, 110 La. 1, 34 So. 103, having held that Potts was without fault, and having awarded his widow damages for his death, it, therefore, was *res judicata* that the defendant was negligent, and that Potts was acting with care. Therefore Whitworth was attempting to save his friend, who was without fault, from the consequences of the negligence of the defendant.

"If the condition be such as shows imminent danger of serious injury or death, the rule is to be applied to the act out of which the contributory negligence is claimed to arise, and, when coupled with the negligence of another in producing the condition, it will be quite an extreme case which

defeats recovery by the court on the ground of contributory negligence. *Gibney v. State*, 137 N. Y. 1, 33 N. E. 142, 19 L. R. A. 365, 33 Am. St. Rep. 690; *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692; *Manthey v. Rauenbuehler* (Sup.), 75 N. Y. Supp. 716.

"In the same case the court further said: 'It is not a case in which fine distinctions can be made as to the position of the truck, the speed of the horse, and the danger which confronted unless stopped.' *Id.* 717.

"So, in the present case, Whitworth saw the necessity for immediate action, and pursued the only possible means of saving Potts. In *Peyton v. Railway Co.*, 41 La. Ann. 864, 6 So. 690, 17 Am. St. Rep. 430, this court said: 'When one risks his life or places himself in a position of great danger in an effort to save another, or to protect another who is exposed to sudden peril or in danger of great bodily harm, it is held that such exposure and risk for such a purpose is not negligence. The law has such high regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons.' See also *Eckert v. Railroad Co.* (N. Y.), 3 Am. Rep. 721, and *Thomps. Neg.*, §§ 198, 199, for a strong presentation of the subject.

"That it is not rashness to voluntarily incur great danger to save another in peril is expressly decided by the Supreme Court of Ohio in *Pa. Co. v. Langendorf*, 48 Ohio St. 316-322, 28 N. E. 172, 13 L. R. A. 190, 29 Am. St. Rep. 553. This court expresses itself thus: 'There was but a fraction of a minute in which to resolve to act, or action would come too late. Under these circumstances, it would be unreasonable to require a deliberate judgment from one in a position to afford relief. To require one so situated to stop and weigh the danger to himself of an attempt to rescue another, and compare it with that overhanging the person to be rescued, would be, in effect, to deny the right of rescue altogether, if the danger was imminent.

"The attendant circumstances must be regarded. The alarm, the excitement, and confusion usually present on such occasions, the uncertainty as to the proper move to be made, the promptness required, and the liability as to mistake as to what is best to be done, suggest that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. And the doctrine that one who, under these or similar circumstances, coming to the rescue of another, thereby encountering great danger to himself, is guilty of negligence *per se*, is neither supported by principle nor authority.'

"In another case (*Eckert v. Long Island R. Co.*, the leading case on the subject) *Grover, J.*, said: 'It was his duty to exercise his judgment as to whether he could possibly save the child without injury to himself. If, from appearances, he believed that he could, it was not negligence to make an attempt to do so, although believing that possibly he might fall and receive an injury to himself. He had no time for deliberation. He must act instantly if at all, and a moment's delay would have been fatal to the child.' 43 N. Y. 502, 3 Am. Rep. 721; *Thomps. Neg.* (2d ed.), pp. 193,

194, 195. See also *Gibney v. State* (N. Y.), 33 N. E. 142, 19 L. R. A. 365, 33 Am. St. Rep. 690; *San Antonio & A. P. Ry. Co. v. Gray* (Tex. Sup.), 67 S. W. 763; *Becker v. Railroad Co.* (Ky.), 61 S. W. 997, 53 L. R. A. 267; 1 *Shearm. & Redf. Neg.*, § 85.

"If latitude of judgment is allowed to the rescuer, although believing that he might fall and receive injury to himself, can a more proper instance be conceived, when Whitworth saw his friend and comrade, meeting an awful death by burning in midair, hanging head down.

"If anything is to be conceded to the excitement and commotion of the moment, can a case be conceived when such excitement could be more natural or irresistible? If decision of thought and quickness of action are ever demanded, when more so than in a case where Potts was entangled in live wires and being roasted to death? If an appeal to humanity is ever to be heeded, when could it be more imperative than on this awful occasion? But defendant's counsel say that Potts was already dead. We say that neither he nor any one else knows or could know that to be a fact.

"The degree of insulation would have much to do with that question, and could only be determined by a test. We feel that plaintiffs have as strong a case as can be well conceived. Here are all the elements to be found to warrant a judgment. The necessity for quick action, the doubt, and uncertainty as to what is the best course, the tragedy of the situation of Potts—all these facts justified Whitworth in running even a great risk to save his friend. Under such circumstances the impulse to aid must have been well-nigh uncontrollable, and all the spectators testify as to the intensity of the excitement prevailing at the time. Whitworth's action must receive its color from the scene in which it is set. What is recklessness at one time may be common prudence when a calamity is impending, and no other resource is apparent. The awful consequences flowing from the gross carelessness and indifference of defendant company stand out in letters of iron. Whitworth's humanity was in striking contrast with its callousness in exposing others to deadly danger, and its cold-blooded plea in keeping with its conduct in weighing the cost of insulation, on the one hand, and the lives of men, on the other. There is nothing in the record to show that deceased knew that the wire was a live one, nor that he intentionally took hold of the deadly instrument. From the evidence, we think it clear that it was his purpose to relieve his dying companion, whom he thought still lived, or he wanted to get the wires out of the street, or cut them and put them away, so that the crowd that was congregating could not come in contact with them. To show contributory negligence, the defendant must prove that he, knowing of the danger, voluntarily exposed himself to it. This it has not done. It has not been shown that he knew the wire he caught hold of was a deadly one, and, unless we assume that he intended to commit suicide, we must presume that he thought the wire harmless.

"It may be claimed that he should have known that his companion was dead, and it may be argued that the situation presented was past human

aid. But that is not the criterion. He could not feel his companion's pulse, and listen to his heart beats, to ascertain if he still lived. The situation, to him, evidently held out the hope that by prompt action he could relieve the situation of his friend. He was not guilty of contributory negligence in acting on the appearances as they were presented to him. He was inexperienced, and, therefore, it is fair to assume he knew little of the dangerous agency with which he was dealing. He evidently thought the wire he attempted to cut would not harm him.

"The jury, who saw and heard the evidence, have rendered a reasonable verdict, and we ask that it be affirmed."

The only act of negligence which defendant charges against Whitworth is his going forward after the accident had happened to Potts, and taking hold of the live telephone wire which he had been using. Defendant's counsel insists that Potts was dead at the time Whitworth took hold of the wire, but we think he is mistaken as to that fact. At that time that Potts received the electric shock from the telephone wire, Holt was below him on the same pole. On discovering what had happened, he went up the pole to where Potts was, to see whether he had by his fall become entangled in any way with any of the wires—intending, if such was the case, to cut them off—and, finding he was not, he went down and crossed the street to telephone to the office to obtain help. On coming out, he saw a policeman going up the pole. He himself returned to the pole with a hand line, went up the pole, and tied it around Potts and lowered him down. Reilly, a witness for the plaintiff, says he was right at Mr. Potts when he was drawing his last breath; that he was right across from where he was; that he heard some one hollering for help; he supposed it was Potts himself; that he was somewhat acquainted with him, and went up the pole where he was. He said he did not help to bring him down, but stayed by the pole until he was brought down by the rope that was put around him by the darky. The witness, being asked how long Mr. Potts lived after he saw him, answered: "Well, I suppose Mr. Potts was dead before I got off the pole. I think he must have been, for, after I got there, he drew a couple of gasps after I got down." Holt testified that upon leaving the house into which he had gone to telephone for help, and after he had returned to the telephone pole, he saw several persons carrying Whitworth off. Therefore Whitworth must have taken hold of the wire in the interval between Holt's leaving the pole after first coming down from it and his going up the pole a second time. Clanton, a witness for the defendant, testified that when he came on one of the Belt Line cars, opposite to the pole on which Potts had been working, he looked up and saw Potts hanging there; that he got off and started toward the pole, and when he got even with Whitworth and about four feet from him, he hollered to him not to touch the wire, but he took hold of it, and it killed him; that he and his brother-in-law, Mr. Price, went on and got a rope that the telephone men were using, and got Potts off the pole; that he saw Potts before any one had gone to him; that Mr. Price was the only one that went up the pole;

that he saw Holt. He was going around trying to get some one to help him take Potts off the pole. Witness repeated "that as he got to the spot Whitworth came up to take hold of the wire, and that he told him not to do it, and he got hold of it, and it killed him."

In answer to a question he stated that Potts was already dead when he first looked at him. This witness was sincere in his statements as to the facts of the case, but his testimony does not accord with that of others. Price was not the first or only man that was on the telephone pole. Holt was upon it at the instant of the accident, and went up to where he was, and then went down, and went up the pole a second time. Holt says before he got back he saw a policeman going up the pole, and Reilly testified that he himself went up, and that Potts was still alive when he got to him; that is to say, he gasped several times after he reached him. Holt and Clanton say they told Whitworth not to touch the wire, but Holt did not tell him the result of the examination of the condition of things which he had found when he went up to where Potts was hanging. He did not tell him that he was then dead, nor did he tell him that he was then free from contact with the live wire, which contact had caused his death. He does not seem to have had any conversation with him as to Potts' condition at that time, and he himself was doubtless not aware of the extent of his injuries. Neither Holt nor Clanton, if they themselves knew the fact, told him of the force of the electricity with which the telephone wire was then charged. Holt, in his testimony, testified that a wire was often hot, and yet not sufficiently so to produce serious injury; that the strength of the current would depend upon the greater or less extent of the leakage from defective insulation.

Whitmeyer saw Whitworth's actions throughout, and testified to the fact that they were evidently aimed at relieving Potts from the supposed danger of his situation.

Wise, Randolph & Rendall, for appellant.

Alexander & Wilkinson and Shepherd & Land, for appellees.

Opinion by NICHOLLS, C. J.

We have had twice before us cases where the plaintiffs in the case were injured in their attempt made to save others from imminent danger. The first case was that of *Peyton v. The Texas Pacific R. Co.*, 41 La. Ann. 861, 6 So. 690, 17 Am. St. Rep. 430; and the second, *De Mahy v. Railroad Co.*, 45 La. Ann. 1329, 14 So. 61. In the second of these cases there was judgment in favor of the defendant under the special facts shown. The injury received was by a mother, who, with her little daughter, about two years

old, had gone as a passenger upon a car operated by the defendant company upon its branch road between St. Martinsville and Cade station. The latter place not being of sufficient importance in its business to justify the building of a passenger station, passengers going from St. Martinsville to Cade were in the habit of remaining in the coach until the train for which they were waiting should reach there. The schedule of the road was so made as to give the company an opportunity in this interval to attach to the coach any freight cars which might have been left at the station to be taken to St. Martinsville. The practice of the company was, upon the trains reaching Cade, to detach the locomotive, and by means of different switches to couple the cars onto the coach, which was left stationary on a track. This coupling necessarily gave, when made, some movement to the coach. On the day in question the coupling was made with no greater force than usual — a coupling from which no injury could or would have resulted under ordinary conditions. On that particular occasion, however, the mother of the child had incautiously permitted it to go several times upon the platform in front of the coach, although the conductor had warned the passengers to keep their seats. The child, not standing steadily upon its feet, was thrown forward by the force of the coupling into the space between it and the freight car just attached, and was in imminent danger of being crushed. The mother, who received herself no injury from the coupling, ran to the front door, down the steps, and, thrusting her arm under the coach, extricated the child, but at the expense of having her own arm badly broken and permanently injured. Her husband sued the company for damages, but judgment was rendered against him on two grounds. The first was that the company was not guilty itself of any negligence; that it had no reason to anticipate that a child of that age would be permitted to be upon the platform; and, second, because the mother, who was injured without fault on the part of the company, had brought her injuries upon herself by allowing the child to go upon the platform. The act on her part which barred the action was not her conduct in placing her arm under the moving car to save her child, but her antecedent act of allowing it to have gone upon the platform.

In the other case (that of *Peyton v. The Texas Pacific R. Co.*,

41 La. Ann. 861, 6 So. 690, 17 Am. St. Rep. 430) judgment was rendered in favor of the plaintiff. The defendant company in that case was adjudged guilty of negligence in running a train upon a thoroughfare of the city of Shreveport, in front of the fair grounds, where a large number of persons were congregated in and around its tracks, at a dangerous rate of speed, in charge of a fireman, instead of a regular, skilled engineer; and, by reason of this negligence, an inebriated man, standing on its tracks in front of the approaching car, with his back to it, was about to be crushed, when a friend went to his rescue, and pulled him successfully off the track, but, in so doing, got struck and injured himself by the car. The defense of contributory negligence on the part of the plaintiff was not sustained. The court evidently considered that the plea of contributory negligence set up by the company which was itself at fault, is one which, though inuring to the company, does so by way of consequence or result, and is not one granted directly to the company in aid of any right which it has itself; that the plea in bar of an action is one which has grown up under jurisprudence, and not by any direct, positive law in aid of the general good and welfare, in furtherance of the two maxims, "*Nul prendra avantage de son tort*," and "*Volenti non fit injuria*," and, being the act of the court, is more or less subject to its control or modification in any given case, where, in its opinion, the public good and welfare are better to be subserved by not applying it, as where the thing done is not in fact to be considered a fault, but a meritorious act. The case at bar differs from the Peyton case in this: that Peyton was injured by being advanced upon and struck by the car of the company while he was in or alongside the tracks of the company, running through a public thoroughfare, while in this case Whitworth himself advanced upon and took hold of the wire of his company, which he had been using in its dangerous condition. In both cases, however, the defendant company was guilty of negligence. In the case of *Corbin v. The City of Philadelphia*, 195 Pa. St. 461, 45 Atl. 1070, 49 L. R. A. 715, 78 Am. St. Rep. 825, this question was very thoroughly considered. The case will be found reported in the forty-ninth volume of the Lawyers' Annotated Reports, accompanied by very copious and valuable notes and extracts taken from decisions of other

States. In the case quoted, the city authorities of Philadelphia had caused a trench to be dug in one of the streets of that city, which became filled with a deadly gas, and which they had abandoned, leaving it without the necessary and proper safeguards to protect the passing public from falling in it. A child went into the trench to recover his ball, which rolled into it, and became overcome by the gas, whereupon a stranger went into the trench, and became himself overcome by the gas, and died. The child revived and escaped injury. The mother of the deceased brought suit against the city to recover damages for the death of her son, and judgment in favor of the defendant was rendered by the lower court, and reversed and remanded by the Supreme Court of Pennsylvania, to be submitted to the jury, three judges dissenting.

That case closely resembles the present one in its legal aspects. The Supreme Court, in the course of its opinion, said:

"A rescuer — one who, from the most unselfish motives, prompted by the noblest impulses that can impel man to deeds of heroism, faces deadly peril — ought not to hear from the law words of condemnation of his bravery because he rushed into danger to snatch from it the life of a fellow creature imperiled by the negligence of another. He should rather listen to words of approval, unless regretfully withheld on account of the unmistakable evidence of his rashness and imprudence. This, conscience and reason approve, and the best judgment of thoughtful and intelligent judges has declared it to be the law of the land."

The court quoted approvingly from *Eckert v. Long Island R. Co.*, 43 N. Y. 503, 3 Am. Rep. 721, which it declared was fairly regarded as the leading case upon the subject.

In the latter case the court said:

"Negligence implies some act of omission or commission wrongful in itself. Under the circumstances in which defendant was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could save the child without serious damage to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt to do so, although believing that he might fail and receive injury to himself.

"He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons."

In the case at bar the jury evidently considered that Whitworth was not guilty of rashness in acting as he did. We ourselves think that he was not fully advised of the precise existing situation, and of the condition of Potts as he then was, hanging upon the pole; that he was not advised as to the precise danger he was himself incurring when he took hold of the wire; and that, even if he heard the warning to him of Holt and Clanton not to touch the wire, he did not know the grounds upon which that warning was based. He may well have conceived that the advice was being given to himself to act from selfish motives, and from the selfish side of his nature, and to take no risks whatever in the premises — advice which his own sense of duty and regard for the safety of others led him not to follow. We certainly cannot impute to him an intention to commit suicide. We do not think we are called upon in this case to go back of the conclusions of fact reached by the jury.

For the reasons herein assigned, the judgment appealed from should be, and it is hereby, affirmed, at costs of appellant.

LAND, J.. recused, having presided in the court below.

On Rehearing (April 11, 1904).

PROVOSTY, J. On further consideration, the amount of the judgment in this case is reduced to \$5,000, and, as thus amended, the decree heretofore handed down is adhered to, and a rehearing is refused.

Boston & Maine Railroad Co. v. Saco Valley Electric Railroad Co.

(Maine — Supreme Judicial Court.)

1. CONSTRUCTION OF CROSSING; DECREE OF RAILROAD COMMISSIONERS.—Under our statutes the whole question of how railroad crossings shall be constructed and maintained is left, in the first instance, to the sound judgment and discretion of the railroad commissioners for determination; and their decision, when made, is final, unless an appeal is taken.

As to rights of street railway company to cross railroad, see *Wabash R. Co. v. Ft. Wayne, etc., Tract. Co.*, 1 St. Ry. Rep. 139, (Ind. Sup.) 67 N. E. 674, and monographic note on page 140 of 1 St. Ry. Rep.; *Oneonta, etc., Ry. Co. v. Coop-*

2. **MODIFICATION OF DECREE.**—They have no authority to modify or change such a decree once made, except upon a new application, notice, and hearing; nor can they, before appeal, make a temporary decree which does not purport to represent their sound judgment and discretion in the premises. Such temporary decree is void.

(Official.)

APPEAL by Boston and Maine Railroad from a decree of railroad commissioners. Decided August 18, 1903. Reported 98 Me. 78, 56 Atl. 202.

J. W. Symonds, D. W. Snow, C. S. Cook, and C. L. Hutchinson,
for appellant.

J. O. Bradbury, for petitioners.

Opinion of **POWERS, J.**

This is an appeal from a decree of the railroad commissioners allowing the Saco Valley Electric railroad to cross at grade the Boston & Maine railroad at Saco and at Buxton.

The decree appealed from is void. It appears upon its face that it does not represent the sound judgment and discretion of the railroad commissioners, but is intended as a temporary expedient until they can make up their minds what ought to be done in the premises. In making the decree they say:

"The Boston & Maine railroad desires to avoid grade crossings. The petitioning company claims that grade crossings are reasonable, and that neither overhead nor undergrade crossings are feasible. We have given the matter considerable attention, several continuances having been made for that purpose. We are yet undecided in the matter.

"The statute (chap. 191, P. L. 1901) provides that, if an appeal is taken to the decision of the railroad commissioners in such case, the commissioners may still determine the manner and conditions of construction and maintenance of such crossing during the pendency of the appeal, and issue the necessary temporary decree therefor.

"Long before this statute, this board, in the matter of the petition of the Bangor, Old Town & Orono railroad for a crossing of the Maine Central railroad at Veazie, made a decree authorizing a temporary crossing at grade.

erstown, 1 St. Ry. Rep. 597, 85 App. Div. (N. Y.) 284, 83 N. Y. Supp. 307, and the following cases reported in this volume: *Philip v. Heraty*, 2 St. Ry. Rep. 480, (Mich.) 97 N. W. 963; *West Jersey, etc., R. Co. v. Atlantic City, etc., Traction Co.*, 2 St. Ry. Rep. 717, (N. J. Eq.) 56 Atl. 890.

This decision will be found in the report of the commissioners for the year 1895, page 92. That decree was afterward changed by the board upon petition of the Maine Central railroad, and the court sustained the commission in its action. *Maine Cent. R. Co. v. B. O. & O. Ry. Co.*, 89 Me. 555, 36 Atl. 1050.

"It is too early now to make a decree under P. L. 1901, chap. 191. We deem it best, however, to make a temporary decree, as we did in the *Veazie case*."

They then granted crossings at grade "until otherwise ordered by this board." It is evident that these words do not mean simply until otherwise ordered by the board upon a new application. That would be true of every decree. Taken in connection with the words "temporary decree," the language used shows an intent to reserve and assert the power of the railroad commissioners to hereafter modify or completely set aside this decree in this same proceeding, should they at any time hereafter come to a decision as to whether "grade crossings are reasonable, or overhead and under grade crossings feasible." We find no such authority granted by statute. In the case of a railroad company of any kind, whose tracks are to be constructed across the tracks of any railroad already built, upon application, notice, and hearing, such crossing shall be made, constructed, and maintained in such manner and under such conditions as shall be ordered by the board of railroad commissioners. Laws 1895, chap. 72, § 2. When the crossings already exist, upon application, notice, and hearing the board are to determine what changes, if any, are necessary, and how such crossings shall be constructed and maintained. Laws 1895, chap. 72, § 1.

By section 3 of the same act such decision is declared by the statute to be "final" unless appeal is taken. No power is reserved to the board *suo motu* to modify or change a decision once made.

In the case of *Maine Cent. R. Co. v. B. O. & O. Ry. Co.*, 89 Me. 555, 36 Atl. 1050, referred to as authority for this temporary decree, the power of the railroad commissioners to make such a decree was not considered. There had been a temporary decree authorizing a grade crossing. Subsequently, upon a new petition, notice, and hearing, the railroad commissioners made an order which provided for an overhead crossing, and abolished the

grade crossing provided for by the temporary decree. Upon appeal these last proceedings were upheld and approved. The validity of the so-called temporary decree was not before the court in that case.

This "temporary decree" differs from the one referred to in the Veazie case in this: that while both granted crossings at grade "until otherwise ordered," this decree contains in itself the statement that the commissioners have reached no decision as to whether grade crossings are reasonable. Grade crossings are not only places of recognized danger, but they are sources of danger to all who travel on either steam or electric roads. The time has not yet come when they can be everywhere abolished, but it was never the intention of the Legislature that they now should be established in cases where the railroad commissioners could not decide that they were reasonable. A decision which contains within itself such a statement of indecision is a *felo de se*, and must fall.

In *Maine Cent. R. Co. v. Waterville & Fairfield Ry. & Light Co.*, 89 Me. 328, 36 Atl. 453, Mr. Justice Walton says:

"It seems to us that the evident intention of the Legislature was to leave the whole question of how railroad crossings should be constructed and maintained, and how the expense of such crossings should be borne, in the first instance to the sound judgment and discretion of the railroad commissioners, and we think that their decision should not be altered or reversed unless manifestly illegal or unjust."

Mr. Justice Strout, in the Veazie case, 89 Me. 555, 36 Atl. 1050, says:

"The question whether public safety requires a highway to pass over or under a railroad at a crossing is left by the statute in the first instance to the judgment of the railroad commissioners, and their decision should not be reversed by this court unless it is manifestly erroneous.

Such language as this was never intended to embrace decisions which do not purport to represent the sound judgment of the board rendering them. They are entitled to no weight, for they do not purport to flow from the judgment of any man or body of men. Neither can such irresponsible decrees, even though unappealed from, afford a basis and justification for action in matters which so clearly concern the public safety. The so-called temporary decree in this case was unauthorized and void.

Upon appeal this court has power to make such order or decree thereon as law and justice may require. Laws 1895, chap. 72, § 5. The question here presented has never been passed upon by that board, to whom it was the intention of the Legislature to refer it in the first instance. While its decision is not conclusive, yet the court should have the benefit of the commissioners' judgment in any subsequent proceedings.

The whole matter is recommitted to the board of railroad commissioners for further proceedings in accordance with this opinion. So ordered.

Withee v. Somerset Traction Co.

(Maine — Supreme Judicial Court.)

1. INJURY TO CONDUCTOR BY CONTACT WITH POLE SUPPORTING TROLLEY WIRE.

— During a crowded condition of a trolley car, by custom and under verbal instructions to the conductor, passengers were received and permitted to ride on the platform and running-boards. In collecting the fares the conductor was obliged to pass along the running-board and step around the passengers, relying on the handle bars for support. While thus engaged in taking fares, the plaintiff, a conductor in the employ of the defendant corporation operating the road, was struck by an inclining trolley supporting pole, which, at the height of plaintiff's head, was nineteen inches from a point vertically above the outer edge of the running-board on the easterly side of the track. The pole which struck the plaintiff was twenty-two inches nearer the rail than the average distance of the 381 poles on the entire line, and inclined toward the track six and one-fourth inches in a height of six feet. The plaintiff had been in the employ of the road for four years on its cars, and had been previously engaged in setting trolley poles. But he had not noticed the proximity or inclination of the accident pole. Held, that the defendant company was negligent in making an improper location of the pole.

2. PREPONDERANCE OF EVIDENCE.— Held, also, that there was no such want of preponderance of evidence as would justify setting aside the verdict in plaintiff's favor rendered by a jury who heard the testimony and viewed the place of the accident, either on the ground of contributory negligence or assumption of risk.

(Official.)

As to injury to employees of street railway company by contact with obstructions at side of track, see note to *Govan v. New Orleans, etc., R. Co.*, 2 St. Ry. Rep. 335, and cases therein cited.

MOTION by defendant for new trial. Decided July 7, 1903. Reported 98 Me. 61, 56 Atl. 204.

Forrest Goodwin, for plaintiff.

Geo. W. Gower, for defendant.

Opinion by PEABODY, J.

The plaintiff was a conductor on an electric car used by the defendant corporation on its street railway between Madison village and Skowhegan, in Somerset county, Me. On the 4th day of July, 1900, when performing the duties of his employment, he was struck by one of the poles erected and maintained by the company for supporting the trolley wires.

The action is brought to recover damages for injuries he sustained, and which he alleges were caused by the negligence of his employer, the defendant corporation. The verdict was for the plaintiff for the sum of \$1,472.08, and the defendant brings the case to this court on motion for a new trial.

The jury must have found, first, that the defendant was guilty of negligence in reference to the plaintiff in the relation of master and servant; second, that the plaintiff did not assume as a risk incident to his employment the special danger of being hit by this particular pole as it was then located; third, that the plaintiff did not contribute to the accident by failure to use due care.

The facts upon which the question of the alleged negligence of the defendant depends relate to two elements of the proposition.

First, as to the location and other conditions of the trolley pole relative to the track and the car on which the plaintiff was serving the defendant as a conductor.

The distance from the inside of the pole to the outside of the rail was forty-four and one-quarter inches, and to the outer edge of the running-board on the side of the car nineteen inches less. The pole inclined toward the track six and one-quarter inches at the height of the plaintiff's head as he stood upon the running-board, so that at that height the handle bars on the posts of the car were twenty-four inches from the pole. The average distance from the rail of 381 trolley poles along the line of the road for twelve miles was about fifty-nine and one-half inches. There were

six (or possibly nine) poles, a fence, and trees, making eighteen objects in all which were slightly nearer to the rail than the accident pole; but they were either vertical or inclined from the track, so that at the height of the conductor's head, with the exception of one pole set in the line of trees, this one was nearest, and was about twenty-two inches nearer than the average. An object at this height, at a point vertically above the outer edge of the running-board, would be within nineteen inches of this pole.

Second. The other facts relate to the nature of the plaintiff's service, and bear upon the duty which the Somerset Traction Company assumed toward its servant, the plaintiff.

The seating capacity of the open car running at the time of the accident was sufficient for about fifty passengers, but on this day there were from 95 to 100. They were received on the car in accordance with the usual custom and verbal instructions, as appears from the testimony of the plaintiff, the motorman, and a former superintendent of the company. In consequence of the crowded condition of the car, passengers stood upon the platforms at each end and on the running-boards on each side.

The trolley poles were placed in different portions of the road on alternate sides, but the greater part on the easterly side of the track, among which was the accident pole. In taking the fares, which was one of the important duties of the conductor, it was impossible or impracticable when the car was crowded, as on this occasion, for him to collect them while standing on the side opposite the passenger. In passing along the running-board for that purpose it was necessary to step around passengers standing upon it, and to rely upon the handle bars for support.

The nearness of this inclining pole to the head of the conductor as he was performing this duty was the direct cause of the injury, and whether the location and maintenance of the pole in its position constituted a failure of the master to provide the plaintiff with a reasonably safe place while performing the service required of him was an important question in issue.

There seemed to be reasons why some of the poles were placed nearer than the average distance. For example, those within the line of trees at the Clough place were naturally located at the same distance as the trees; those near the bridge at the same dis-

tance as the trestle; and those at the curves might properly be somewhat nearer than the ordinary distance, because the car inclined away from them. But no reason or explanation is given why the trolley pole in question and those immediately north and south were set nearer than was usual along the electric road.

It is claimed in behalf of the plaintiff that the company, by locating this pole and allowing it to remain with a decided inclination toward its cars, fitted with running-boards on which passengers were not only permitted but invited to stand when the sitting room was occupied, made it unsafe for the conductor as he passed between the pole and passengers in collecting the fares, and that it was consequently guilty of negligence in reference to him while engaged in the line of his duty. This was properly submitted to the jury for their determination.

In *Nugent v. Boston, Concord & Montreal R. Co.*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151, a brakeman, in pursuance of the signal for setting brakes, was rapidly ascending an iron ladder on the side of a box car, and was brought in contact with the end of the depot awning, and suffered injuries.

In this action against the company he recovered a verdict, and upon motion for a new trial it was held that the presiding justice properly submitted to the jury the question of the defendant's negligence, and that of the plaintiff's exercise of ordinary care, and the law court declined to interpose and set the verdict aside.

Illustrations were given by reference to similar cases showing that fair-minded men may reasonably arrive at different conclusions upon admitted facts. *Gibson v. Erie Ry. Co.*, 63 N. Y. 449, 20 Am. Rep. 552; *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593.

These cases are not unlike the case at bar. That last cited was an action against a railroad company by a brakeman for injuries by collision with a projecting awning on one of its station-houses; and it was held that the danger was such as might well escape the observation of a person who had been in the employ of the defendant for a long period of time, and that the company was liable for the damages sustained.

The next proposition to be considered is one of equal importance.

While, by the well-established rules of the law of master and ser-

vant, the master is under an implied obligation to furnish and maintain for the servant a reasonably safe place for the performance of the duties required and reasonably safe appliances connected with the business, the servant is under like obligation to use due care and to assume all obvious and usual risks incident to his employment.

If the defect was an obvious one, or if the plaintiff knew, or by the exercise of ordinary care ought to have known, that this pole was unusually near or inclined toward the track so as liable to hit a person passing another on the running-board of the car, the danger was a risk which he assumed, and he could not recover for injuries sustained through the negligence of the defendant in reference to its location and continuance.

In *Hall v. Wakefield & Stoneham Street Ry. Co.*, 178 Mass. 98, 59 N. E. 668, a conductor stepping around a person standing on the running-board of the car came in collision with a tree. It was held that the tree near the track was a permanent condition of the plaintiff's employment, and that having been employed for some time he took the risk.

In *Goldthwait v. Haverhill, etc., Ry. Co.*, 160 Mass. 554, 36 N. E. 486, the plaintiff, while employed in its carhouse by the defendant, was injured by having his leg caught between the running-boards of two open cars. Barker, J., says: "It [the danger] was not only incident to his employment, but so obviously incident that he must be presumed to have known and appreciated it, and must be held to have accepted as one of the risks of his employment the danger of injury to himself by being caught between cars swinging toward each other on the tracks at the entrance of the carhouse." *Lovejoy v. Boston & Lowell R. Co.*, 125 Mass. 79, 28 Am. Rep. 206.

In *Ryan v. New York, etc., R. Co.*, 169 Mass. 267, 47 N. E. 877, the plaintiff, descending from a moving freight car in the discharge of his duties as brakeman, was injured by coming in contact with a fence three feet and nine and one-half inches from the nearest rail of the track. Holmes, J., says: "The fence which the plaintiff struck was a permanent visible structure, and under our decisions (Mass.) did not constitute one of those unusual dangers to which an employee who has not taken the risk of them

with actual knowledge of their existence has a right to assume that he will not be exposed by entering an employment."

In *Ladd v. Brockton Street Ry. Co.*, 180 Mass. 454, 62 N. E. 730, in some particulars closely resembling the case under consideration, the plaintiff, while engaged in learning the duties of a street car conductor in the defendant's employment, and having had experience on other roads and being familiar with the general duties, was struck while standing on the running-board of a moving car by a trolley post and injured. The post by which he was struck was one of several along the same side of the track, and about equally distant therefrom, but there was no evidence that they were unusually near the track. It was held that the plaintiff assumed the risk, and upon entering the employment of the defendant he must be held to have contracted with reference to the existing arrangement of the track and trolley posts.

The plaintiff in this case had been employed for four years by the company either as motorman or conductor, and had previously been engaged in setting trolley poles, some of them being the identical ones which are located at no greater distance from the track than the pole in question.

He testified that the rule for locating the poles was that the distance from the center of the poles to the center of the track should be eight feet, and that he did not know that there was any deviation except in a few instances where he had observed that the track was moved toward one side of the true location, so that the center stakes were not equi-distant from the rails. The poles within the line of trees at the Clough place were known to him to be nearer the track than the usual distance; but these were always kept in mind by his observance of the requirement of the superintendent that passengers should be warned to avoid being struck by them; no instruction had been given him in reference to this pole; no notice that it was dangerously near the track, and he did not know the fact before the accident.

There is in the case the testimony of one witness which tends to show that the plaintiff did know this, because, as he states, the conductor cautioned the passengers to look out for the pole immediately before he was himself struck by it. And two other witnesses testify to the warning given by him, but not so definitely

as to the words, time, or place as necessarily to conflict with the plaintiff's testimony that he gave no warning as to poles, but that he did so as to the trees.

It is contended by the defendant that, while the plaintiff may not have appreciated or actually known the danger, his obliviousness to so obvious an object of peril to himself, which he had passed thousands of times — several times daily — was more than want of ordinary care, which he was bound to use; it was gross carelessness.

But his explanation is that its proximity to the track was not apparent by reason of any marked contrast with the position of other poles north and south of it, as it was in alignment with them; that he had occasion to collect fares usually at points at some distance from it, and had not necessarily passed it while standing on the running-board, so as to be made conscious of its unusual nearness to the car; and that when not occupied with taking fares his place was in the center of the rear platform, and while he had been employed as motorman he stood in the center of the front platform, places not favorable for detecting or noticing such a defect. Also, in this connection, it is a relevant fact that the motorman and former superintendent, men presumably observant and watchful, having the same opportunity and owing the same duty to the company, failed to observe this particular pole before the accident.

Affirmative proof that the plaintiff did not fail to exercise the legal standard of care is required.

In his testimony, in addition to the facts and circumstances already referred to, he states that two passengers were taken onto the east side of the car and stood upon the running-board. He had previously collected all the other fares, and for the purpose of collecting the fares of these passengers he was in the act of passing around one or two persons holding onto the handle bars with both hands, in the same manner as he had been accustomed to do, when he was brought in contact with the trolley pole. If his testimony is true, it was the usual course in collecting fares when the car was crowded, and he would have been as free from danger as when collecting fares on the opposite side of the car but for the improper location and maintenance of this trolley pole. But the

testimony of a passenger on the car at the time tends to show that the plaintiff was negligent. He states that, in passing the witness on the running-board, the conductor, instead of holding to the handle bars, held to the arm of the witness. This the plaintiff denies. Their testimony is apparently in conflict, but is not so necessarily. The plaintiff's left hand must have been released from the handle bar in passing the witness, and may have involuntarily pressed against or grasped his arm.

We think the principle of *Nugent v. Boston, Concord & Montreal R. Co.*, *supra*, applies to this case, and that it was for the jury to determine the question of negligence and due care; and, although we might upon the evidence as reported have reached a different conclusion on some or all of the propositions involved, it is to be considered that the jury had the opportunity, which we have not had, to view the place of the accident, to observe the poles and other objects called to their attention, and to see the witnesses when testifying.

And a careful review of the case does not show such obvious want of a preponderance of the evidence in favor of the plaintiff as indicates that the jury were improperly influenced or failed to observe the rules given them by the court, nor that the damages are excessive.

Motion overruled.

State to Use of Egner v. United Railways & Electric Co.

(Maryland—Court of Appeals.)

INJURY TO PASSENGER ON STATION PLATFORM; NEGLIGENCE.—The plaintiff's intestate was standing upon a platform maintained by the defendant, waiting for a car, and was struck by the footboard of a car passing the platform. It appeared that the decedent had ample space on the platform to stand without coming in contact with the footboard of the car. Other cars had passed the platform while he stood there, and he had opportunity to notice the portion of the platform which the footboard would cover. The platform had been in use for a number of years and

Injury to passengers at stations.—Other cases reported in this series relating to injuries caused by alleged defects in stations and platforms are: *Aston v. St. Louis Transit Co.*, 2 St. Ry. Rep. 631, (Mo. App.) 79 S. W. 999; *Dittman v. Brooklyn Hts. R. Co.*, 2 St. Ry. Rep. 801, 91 App. Div. (N. Y.) 378,

had accommodated ten or twelve persons with perfect safety. It was held that in the absence of reasonable evidence of any specific act of negligence on the part of the employees of the defendant, it was improper to submit the case to the jury.

APPEAL by plaintiffs from judgment for defendant. Decided January 13, 1904.
Reported (Md.), 56 Atl. 789.

C. Dodd McFarland, for appellants.

George Dobbin Penniman, for appellee.

Opinion by BRISCOE, J.

This action was brought by the equitable plaintiffs in the Baltimore City Court against the United Railways & Electric Company of Baltimore to recover damages for the alleged killing of one David Egner. At the close of the plaintiffs' case the court instructed the jury that the accident to the deceased was directly contributed to by his own negligence, and their verdict must be for the defendant. The single question, then, presented on the appeal, is whether the evidence supports this ruling.

The appellant is a body corporate duly incorporated under the laws of the State of Maryland, and owns a railway track and cars for the transportation of passengers along Hartford avenue, in Baltimore county. On the 23d of June, 1901, the deceased went on the platform of the defendant for the purpose of boarding one of its cars as a passenger from Southern avenue to Baltimore city, and, while standing thereon and waiting for a car, was struck by a rapidly moving car, knocked therefrom, and sustained serious

86 N. Y. Supp. 878 (in which case it appeared that the plaintiff was admitted to the station platform to wait for a train, and that when she first reached the platform there were few people upon it, but subsequently a large crowd of passengers had collected, so that when the train finally came she was pushed by the crowd with considerable force against the side of the car, sustaining the injuries for which the action was brought, and it was held that the question of the defendant's negligence in permitting passengers to accumulate upon the platform was one for the jury); *Cotant v. Boone Sub. Ry. Co.*, 2 St. Ry. Rep. 269, and note (Iowa), 99 N. W. 115.

In the case of *Hayden v. Fairhaven, etc., R. Co.*, 2 St. Ry. Rep. 67 (Conn.), 56 Atl. 613, a person standing on the edge of a sidewalk was injured by being struck by the running-board of a car which overlapped the sidewalk, and it was held that the company was not liable.

injuries, from which he died. The cause of action is alleged to be the negligence of the defendant in constructing the platform, by making it too narrow, and omitting hand rails for the protection of passengers, so as to prevent them from falling at the southerly end of the platform. The railway tracks of the appellee company are constructed on the west side of the Hartford turnpike, which runs in a northerly and southerly direction. The platform is located at the corner of the turnpike and Southern avenue, and between the westernmost or south-bound track and the west side of the turnpike. This platform is used by the passengers in boarding the cars, and is described as level and filled with ashes. It was about fifteen feet long and four feet wide, from the track. A car with a footboard would extend over the platform about eighteen inches, leaving a space of about two feet and a half for passengers to stand on while waiting for a car.

The accident occurred under the following circumstances: The witness Eisennacher, who was on the platform at the time of the accident, testified: That he was on the platform three or four minutes before the Egners came. That he stood at the north end of the platform; second, John Egner, with his small child in his arms; third, Mrs. John Egner; and, fourth, at the south end of the line, David Egner, the deceased. That the car was coming from the north and going south. The first car was signaled, but it did not stop. The second car did not stop, but passed the platform on which the party was standing. The third car came at the rate of thirty or thirty-five miles an hour. He tried to stop it, but failed. The next thing he saw was Mr. Egner in the gutter alongside of the platform. He was struck by the footboard of the car. He also testified there was nothing to obstruct the view of the car from the platform for a distance of 150 yards. John Egner, who was standing on the platform near the deceased, corroborated the evidence as to the location of the accident, but did not see the car strike the deceased. Mrs. Egner, who was present, did not see the car strike the deceased, but, as she turned around and looked for her child, did not see the deceased until they had picked him up; could see the car approaching at a distance of 400 feet, and they were standing close together on the platform. The witness Albrecht, who lives at the corner of Hartford road and Southern avenue, the place where the accident happened, tes-

tified: That the platform is a stopping place. As a matter of fact it is not a platform, but is level with the track, and filled up with ashes, and from the car track it is about four feet wide. Counting what projects from the car, there is a space of about two and one-half feet for passengers to stand on. Standing on the ground it is about eighteen inches high. There is a board on the back and a board on top of it, like a seat. It is used by persons who are tired and want to sit down and wait for the cars. On cross-examination he testified that the platform had been there about three years, and it was very much used. He had seen ten or twelve persons standing on the platform. He had often seen cars running rapidly by the platform when persons were standing on it.

We have thus stated the material portions of the testimony, and, upon a careful examination of the record, do not find in the testimony such evidence of negligence on the part of the appellee company as entitled the plaintiffs to recover. It is well settled by numerous decisions of this court that, to entitle a plaintiff to recover in actions of this kind, "there must be some reasonable evidence of well-defined acts of negligence or breach of duty on the part of the defendant, causing the injury complained of." It is incumbent upon the plaintiff to prove, first, that there was a neglect of duty by the defendant; and, secondly, that the injury was the direct consequence of such neglect of duty. In this case the evidence shows that the deceased was struck by "the footboard of the car" while passing the platform on which he was standing, and he was thrown therefrom and fatally injured. There was no evidence whatever that the motorman in charge of the car acted in a negligent or unlawful manner when passing the platform, or that the car differed in construction from the other cars that had passed while the deceased was on the platform. On the contrary, the evidence shows that the deceased had ample space on the platform to stand without coming in contact with the footboard of the car. He was standing at the south end of the platform, and the car, which was coming from the north and going south, passed in perfect safety four persons standing on the same platform before it reached him. He had an uninterrupted view of the approaching car, and had an opportunity, from the passing of the two previous cars, to notice the portion of the platform which would be covered by the footboard. According to the uncon-

tradicted evidence of all the witnesses in the case, the platform was of sufficient width for a car to pass in safety with passengers on it. The platform had been in use for years, and had accommodated ten or twelve persons with perfect safety. In the case of *United Rys. Co. v. Fletcher*, 95 Md. 533, 52 Atl. 608 — a somewhat similar case — this court said the mere fact that the plaintiff, whilst standing in a narrow space between the car and ditch, came in contact with the body of the conductor, is not *per se* even *prima facie* evidence of negligence on the part of the latter. In the absence of reasonable evidence of any act of negligence or failure of duty on the part of the conductor, it was improper to let the case go to the jury, to be determined by surmise or conjecture. The cases cited by the appellant do not conflict with the conclusion we have reached in this case.

As this view disposes of the case, it will not be necessary to consider the question of contributory negligence raised on the prayer, and, as there can be no recovery by the plaintiff, the judgment will be affirmed. *State, Use of Bacon, v. Railroad Co.*, 58 Md. 485.

Judgment affirmed, with costs.

United Railways & Electric Co. v. Biedler.

(Maryland — Court of Appeals.)

COLLISION WITH VEHICLE CROSSING TRACK; IMPUTED NEGLIGENCE.—The plaintiff was riding with his brother, an experienced driver, and while attempting to cross one of the tracks of the defendant the wagon was struck by one of the defendant's cars and the plaintiff was severely injured. At the point where the crossing was attempted a car could have

IMPUTED NEGLIGENCE.

1. Negligence of street railway employee imputed to passenger.
2. Negligence of driver of vehicle imputed to occupant.
 - a. General rule.
 - b. Competency of driver.
 - c. Qualification of rule; care to be exercised by occupant.
 - d. Negligence of driver of fire truck.
 - e. Persons engaged in common enterprise.
 - f. Negligence of driver of hired vehicle.

been seen approaching for a distance of forty or fifty feet; no car being seen the driver gave his horse a free rein and started to cross the track; but the horse and buggy were struck before the crossing was completed. It appeared that neither the plaintiff nor the driver heard any gong on the approaching car. An instruction to the effect that the plaintiff exercised no control over the driver and the management of the horse, and that if the jury find that the driver was guilty of negligence in the manner in which he drove the horse, which contributed to the accident, the driver's negligence should not be imputed to the plaintiff and is not a bar to recovery, was sustained. The driver being one whom the plaintiff knew to be skillful and experienced, and the plaintiff observing the driver check his horse as they approached the tracks and lean forward beyond the side curtains to look for cars, the plaintiff was not guilty of contributory negligence in thus relying on the care of the driver, although he himself took no precaution to avoid the injury.

APPEAL by defendant from judgment for plaintiff. Decided January 20, 1904.
Reported (Md.), 56 Atl. 813.

M. Ernest Jenkins and *B. Howell Griswold, Jr.*, for appellant.
Vernon Cook, for appellee.

Opinion by SCHMUCKER, J.

The question presented by this case is a narrow one. The appeal is from a judgment recovered by the appellee against the appellant in the Superior Court of Baltimore city for damages

3. Negligence of husband imputed to wife.

4. Negligence of parents, guardians, or other custodians imputed to children.

a. General rule.

b. Action for death of child.

c. Action by parent.

d. Exercise of care by child.

e. Negligence in permitting child to go on street.

f. Negligence in failing to avoid injury to child.

5. Other cases reported in this series.

1. Negligence of street railway employee imputed to passenger.—Cases have arisen where passengers upon a street car were injured by a collision with a street railroad train at a railroad crossing, caused by the negligence of the street railway employees. The general rule is that the negligence of the driver or motorman in charge of a street car is not imputable to a passenger riding therein, precluding the recovery of damages for injuries so received from the steam railroad company. *Little Rock, etc., R. Co. v. Harrell*, 58 Ark. 454, 25

for injuries caused by a collision between a carriage in which he was riding and one of the appellants' electric cars. It is admitted in the record and on the briefs of counsel that there is evidence in the case legally sufficient to establish the existence of

S. W. 1117; *Woodley v. Baltimore, etc., R. Co.*, 15 D. C. 542; *Kuttner v. Lindell Ry. Co.*, 29 Mo. App. 502; *Bennett v. N. J. R., etc., Co.*, 36 N. J. L. 225, 13 Am. Rep. 435; *McCallum v. Long Island R. Co.*, 38 Hun (N. Y.), 569 (in which case the court held that the negligence of the driver or conductor of a street car was not imputable to a passenger therein, and the fact that their negligence contributed with that of the defendant's engineer and fireman in causing the accident would not defeat the plaintiff's right to recover; the plaintiff's intestate was not bound to stop, look, or listen for an approaching train, but could, as a passenger, reasonably assume that proper care and attention would be given at the crossing by those in charge of the car, before an attempt would be made to go over it); *Covington Transfer Co. v. Kelly*, 36 Ohio St. 86; *Gulf, C. & S. F. Ry. Co. v. Pendery*, 87 Tex. 553, 29 S. W. 1038, 47 Am. St. Rep. 125. If a passenger is injured by a collision between a street car and the cars of a railroad company, caused by the concurring negligence of the employees of the street railway and railroad company, a joint and several liability is created against both companies, notwithstanding the fact that from the evidence it might be inferred that the negligence of the employees of the street railway company was the proximate cause of the injury. *Georgia Pacific Ry. Co. v. Hughes*, 87 Ala. 610, 6 So. 413.

2. Negligence of driver of vehicle imputed to occupant. a. General rule.—It may be stated as a general rule that where a person occupies a vehicle upon the invitation of another, without exercising or assuming any control or supervision over the management of the vehicle or the driving of the team, the driver's negligence will not be imputed to such person. In such a case the driver does not become the agent or servant of the person riding with him, and such person is not held accountable for his acts. See *Read v. City, etc., Ry. Co.*, 115 Ga. 366, 41 S. E. 629; *Nisbet v. Town of Garner*, 76 Iowa, 314, 39 N. W. 516, 9 Am. St. Rep. 486, 1 L. R. A. 152; *Hajsek v. Chicago, etc., R. Co.* (Nebr.), 94 N. W. 307; *Morris v. Metropolitan Street Ry. Co.*, 63 App. Div. (N. Y.) 78, 71 N. Y. Supp. 321, affirmed 171 N. Y. 592 (in which case it was held that as it did not appear that the relation of master and servant existed between the plaintiff's intestate and the driver of a brougham in which he was riding, or that the driver was under the express control of the intestate, the intestate was not responsible for any negligence on the part of the driver); *McCormack v. Nassau Elec. R. Co.*, 18 App. Div. (N. Y.) 333, 46 N. Y. Supp. 230; *Strauss v. Newburgh Elec. Ry. Co.*, 6 App. Div. (N. Y.) 264, 39 N. Y. Supp. 998; *Kessler v. Brooklyn Hts. R. Co.*, 3 App. Div. (N. Y.) 426, 38 N. Y. Supp. 799; *McCaffrey v. D. & H. C. Co.*, 62 Hun (N. Y.), 618, 16 N. Y. Supp. 495; *Bennett v. N. Y. C. & H. R. R. Co.*, 61 Hun (N. Y.), 623, 16 N. Y. Supp. 765.

negligence on the part of the defendant, in running the car at too high a speed, which directly contributed to the plaintiff's injury. The plaintiff was, therefore, entitled to recover in the case unless he was debarred therefrom by contributory negligence on

This rule is not universally accepted as the true doctrine. A number of cases are to the effect that a person who voluntarily takes passage in a vehicle driven and managed by another assumes the risk of the care and skill of the driver, and if an injury results to which the negligence of the driver contributed, such person cannot recover therefor. *Mullen v. City of Owosso*, 100 Mich. 103, 58 N. W. 663, 43 Am. St. Rep. 436; *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274; *Schindler v. Milwaukee, etc., Ry. Co.*, 87 Mich. 410; *Cowan v. Muskegon Ry. Co.*, 84 Mich. 583, 48 N. W. 166; *Whitaker v. City of Helena*, 14 Mont. 124, 35 Pac. 904, 43 Am. St. Rep. 621; *Omaha, etc., Ry. Co. v. Talbott*, 48 Nebr. 627, 67 N. W. 599; *Otis v. Town of Janesville*, 47 Wis. 422, 2 N. W. 783; *Prideaux v. City of Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558 (in which case it was held that the driver of a private conveyance is the agent of the person in such conveyance, so that his negligence, contributing to the injury complained of by such person, will defeat his action). In the case of *Mullen v. City of Owosso*, Judge Hooker emphatically dissented from this doctrine and contended that the great weight of authority establishes the rule that "in cases like the present the question becomes one of fact; the test of the passenger's responsibility for the negligence of the driver depending upon the passenger's control, or right of control, of the driver, so as to constitute the relation of master and servant between them." A large number of cases were cited by him in support of his contention. In *Shearm. & Redf. Neg.*, § 66, in speaking of this doctrine, it is said: "This extraordinary theory was invented in Wisconsin, and sustained by a process of elaborate reasoning; and this Wisconsin decision, in evident ignorance of all decisions to the contrary, was recently followed, with some similar reasoning, in Montana; and in Nebraska without any reasoning whatever; which last is certainly the best method of reaching a conclusion, directly opposed to common sense, and to the decision of twenty other courts. The notion that one is the 'agent' of another, who has not the smallest right to control or even advise him, is difficult to support by any sensible argument. This theory is universally rejected, except in the three States mentioned, and it must soon be abandoned even there."

b. Competency of driver.—Where a person who accepts an invitation to ride with another has no reason to doubt the efficiency of the driver or his competency, he cannot be charged with his negligence, where such person was himself free from fault. *Elyton Land Co. v. Mingea*, 89 Ala. 521, 7 So. 666; *Metropolitan St. Ry. Co. v. Powell*, 89 Ga. 601, 10 S. E. 118; *Lake Shore, etc., Ry. Co. v. Boyts*, 16 Ind. App. 640, 43 N. E. 667; *Town of Knightstown v. Musgrove*, 116 Ind. 121, 18 N. E. 452, 9 Am. St. Rep. 827; *Brannen v. Kokomo, etc., Road Co.*, 115 Ind. 115, 17 N. E. 202; *Ouverson v. City of Grafton*,

his part, or on the part of some one for whose negligence he was responsible. The single question presented for our determination is whether the record contains evidence legally sufficient to prove the existence of any such contributory negligence.

5 Md. 281, 65 N. W. 676; *Noyes v. Town of Boscawen*, 64 N. H. 361, 10 Atl. 690, 10 Am. St. Rep. 410; *Robinson v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 11, 23 Am. Rep. 1; *Cain v. Traction Co.*, 1 St. Ry. Rep. 657, 48 Ohio Law Bull. 1.

c. *Qualification of rule; care to be exercised by occupant.*—The rule is not to be applied so as to relieve a person riding with another upon invitation, from the exercise of any care whatever to avoid an injury. While the negligence of the driver will not be imputed to him, he will not for this reason be freed from responsibility for his own negligence. As stated in *Shearm. & Redf. Neg.*, § 66a, “no one can be allowed to shut his eyes to danger, in blind reliance upon the unaided care of another, without assuming the consequences of the omission of such care.” And as stated in *Nellis Street Railroad Accident Law*, p. 485, “in all such cases, in order to recover for negligence, the plaintiff is bound to show that he himself was free from contributory negligence, it being the duty of the person so occupying a vehicle, where he has the opportunity to do so, as where he is seated alongside the driver of the vehicle, to exercise his faculties to discover approaching danger, and avoid it, if practicable, by communicating the fact to the driver, or otherwise.” In the case of *Brickell v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648, it was held that one injured at a railway crossing, while riding in a vehicle driven and owned by another, cannot recover of a railway company for such injuries, where he, as well as such driver, was negligent in not making any effort to ascertain whether or not a train was approaching. The court said: “It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger, and avoid it if practicable. The plaintiff was sitting upon the seat with the driver, with the same knowledge of the road, the crossing and environment, and with at least the same, if not better, opportunity of discovering dangers than the driver possessed, and without any embarrassment in communicating them to him.” The rule in such case is laid down in *Hoag v. N. Y. C., etc., R. Co.*, 111 N. Y. 199, 18 N. E. 648, where a husband and wife were sitting upon the same seat in a vehicle driven by the husband, and both were killed by a collision at a crossing, and in an action brought by the administratrix of the wife, against the railroad company, it was held, “that she had no right, because her husband was driving, to omit such reasonable and prudent effort to see for herself that the crossing was safe. She was bound to look and listen.” See also in this connection: *Flanagan v. N. Y. C., etc., R. Co.*, 70 App. Div. (N. Y.) 505, 75 N. Y. Supp. 225, affirmed, 173 N. Y. 631 (holding that the negligence of the plaintiff’s intestate’s companion, who was driving, could not be imputed to him, but that the mere fact that the intestate had no control over the horse did not relieve him from the duty of looking and listening

The material facts as they appear from the record are as follows: On May 25, 1901, the appellee, upon the invitation of his brother, Dr. H. H. Biedler, rode with the latter in his buggy upon his round of professional visits in Baltimore city. The doctor

for himself and doing all that a prudent man could do under similar circumstances); *Morris v. Metropolitan St. Ry. Co.*, 63 App. Div. (N. Y.) 78, 71 N. Y. Supp. 321, affirmed, 170 N. Y. 592; *Galveston, etc., R. Co. v. Kutac*, 72 Tex. 643, 11 S. W. 127; *Allen v. Maine, etc., R. Co.*, 82 Me. 111; *Deane v. Pennsylvania R. Co.*, 129 Pa. St. 514, 15 Am. St. Rep. 733; *Township of Crescent v. Anderson*, 114 Pa. St. 643, 60 Am. Rep. 367.

d. Negligence of driver of fire truck.—The contributory negligence of the driver of a fire truck or hosecart which collided with a street car is not imputable to a fireman on the truck, where it appeared that he had no control over the driver, and was not under his authority. *Geary v. Metropolitan St. Ry. Co.*, 1 St. Ry. Rep. 581, 84 App. Div. (N. Y.) 514, 82 N. Y. Supp. 1016. See also *Birmingham Ry. & Elec. Co. v. Baker* (Ala.), 31 So. 618.

e. Persons engaged in common enterprise.—Where a person is riding with another and is injured by a collision with a street car, and such person and the driver are engaged in a common enterprise, the contributory negligence of the driver is imputable to the person injured. *Cass v. Third Ave. R. Co.*, 20 App. Div. (N. Y.) 591, 47 N. Y. Supp. 356; *Smith v. N. Y. C., etc., R. Co.*, 4 App. Div. (N. Y.) 493, 38 N. Y. Supp. 666; *Donnelly v. Brooklyn City R. Co.*, 109 N. Y. 16, 15 N. E. 733. If the person riding is a joint contributor with the driver to the hire of the team for the occasion, he is deemed negligent if he does not look for approaching cars on crossing a street car track in a suburban and thinly settled district of a city. *Shindalus v. St. Paul City Ry. Co.* (Minn.), 83 N. W. 386.

f. Negligence of driver of hired vehicle.—Where a person hires a hack, cab, or other public conveyance to convey him from one place to another, and the driver is only subject to his control to the extent of directing him as to the place where he wishes to go, the negligence of such driver, contributing to an injury to such person, is not imputable to him. The rule in such case is not materially different from that applicable to the case of a person riding with another upon invitation. If the circumstances are such as to place the driver directly and necessarily under the control of the person conveyed, the driver's negligence would be imputable to him. But where the circumstances are such that he would not be required to exercise any control over the conduct of the driver, he is not responsible for his negligence. *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. ed. 652. A passenger in a public hack is not required to supervise the actions of a driver at a railroad crossing, nor to look or listen for approaching trains, unless there was reasonable cause to distrust the driver's efficiency. *East Tennessee, etc., Ry. Co. v. Markens*, 88 Ga. 60, 13 S. E. 855, 14 L. R. A. 281; *Larkin v. Burlington, etc., Ry. Co.*, 85 Iowa, 492, 52 N. W. 480; *Randolph v. O'Riordon*, 155 Mass. 331, 29 N. E. 583; N. Y.,

was an experienced driver, and quite familiar with the locality of the accident, and his horse was a quiet one. The horse and buggy which he drove were his own property, and the appellee was merely his guest, and had nothing whatever to do with the

L. E. & W. R. Co. v. Steinbrenner, 47 N. J. L. 161, 54 Am. Rep. 126; *Transfer Co. v. Kelly*, 36 Ohio St. 86; *Bradley v. Ohio, etc., Ry. Co.*, 126 N. C. 735, 36 S. E. 181. In the case of *Frank Bird Transfer Co. v. Krug*, 30 Ind. App. 602, 65 N. E. 309, it appeared that the plaintiff employed a transfer company to convey her to a railway station, and exercised no control over the driver of the carriage, and she was injured by the overturning of the carriage in a collision with a street car, caused by the concurrent negligence of the driver and the railway company, and it was held that the driver's negligence was not imputable to the plaintiff so as to prevent her recovery against the railway company.

In the case of *Callahan v. Sharp*, 27 Hun (N. Y.), 85, it appeared that the plaintiff's wife hired a two-horse coach and a driver from a livery-stable and drove out with her children; on approaching a railroad track the flagman at the crossing signaled the driver not to cross; the driver notwithstanding made efforts to cross and there was a collision in which one of the children was killed. It was held that as the driver of the coach was subject to the control and commands of the mother, his negligence was imputable to her; and since the mother and the children were engaged in a joint enterprise in which she acted for herself and them the negligence so imputed to her should be attributed to the deceased child and prevented a recovery by his relatives. The question involved in this case as in other similar cases is based upon the control which the injured person had over the driver of the vehicle. If it had appeared in such case that the driver was not subject to the control of the mother and was not under her direction his negligence could not have been imputed to her, and the child's relatives would have been entitled to recover.

It is clearly apparent that where the driver of a hack in which the plaintiff was riding was under the influence of intoxicating liquor, and such intoxication contributed to his carelessness, the plaintiff is guilty of contributory negligence in taking passage with him, and in failing to use due care for his own protection, knowing, or having opportunity to know, of the incompetency of such driver. *Cain v. Traction Co.*, 1 St. Ry. Rep. 657.

3. *Negligence of husband imputed to wife.*—Under the common law the negligence of the husband while the wife is under his immediate care is imputable to the wife, so as to bar her recovery for injuries to which such negligence contributed. See *Shearm. & Redf. Neg.*, § 67, citing *Peck v. N. Y. & N. H. R. Co.*, 50 Conn. 379; *Yahn v. Ottumwa*, 60 Iowa 429; *Carlisle v. Sheldon*, 38 Vt. 440; *Morris v. Chicago, etc., R. Co.*, 26 Fed. 22. But in those States where the common-law rights of husband and wife have been modified by statute, so that the wife is authorized to recover for

management of the horse or vehicle. At the time of the collision with the car the buggy was going west along the north side of Twenty-third street, toward St. Paul street. The doctor, who was driving, sat on the right side of the buggy, and the appellee

personal injuries to the same extent and in the same manner as a *feme sole*, the rule in respect to the negligence of her husband being imputed to her, is the same as in the case of the negligence of other persons; so that where a wife is injured at a railroad crossing by a collision with the vehicle in which she is riding driven by her husband, caused by his negligence, such negligence cannot be imputed to her, and she may recover. *Lake Shore, etc., Ry. Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476; *Chicago, St. Louis, etc., R. Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280; *Louisville, etc., Ry. Co. v. Creek*, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; *Hedges v. Kansas City*, 18 Mo. App. 62; *Hoag v. N. Y. C., etc., R. Co.*, 111 N. Y. 199, 18 N. E. 648; *Platz v. City of Cohoes*, 24 Hun (N. Y.), 101, 8 Abb. N. C. 392, affirmed, 89 N. Y. 219; *Galveston, etc., Ry. Co. v. Kutac*, 76 Tex. 473, 13 S. W. 327.

4. **Negligence of parents, guardians, or other custodians imputed to children.**
a. **General rule.**—The rule that the negligent conduct of a parent, guardian, or custodian in allowing a child *non sui juris* to be exposed to danger, which negligence is the proximate cause of the injury, is contributory negligence, which must be imputed to the child, and will bar the plaintiff from recovery in an action brought by such child for personal injuries, was early adopted and is still maintained in New York, and is sometimes referred to as the New York rule. The reason assigned for the rule is that the child stands in such a relation of privity to the negligent parent, guardian, or custodian as exists in law between a master and servant, and principal and agent, and that the maxim *qui facit per alium facit per se* is directly applicable. *Nellis Street Railroad Accident Law*, p. 476, and cases cited in note 21, on page 477.

There is great diversity of opinion in respect to this subject. The New York cases sustaining the rule as above stated are as follows: *Etherington v. Prospect Park, etc., R. Co.*, 88 N. Y. 641; *Weil v. Dry Dock, etc., R. Co.*, 119 N. Y. 147, 23 N. E. 487; *Cumming v. Brooklyn City R. Co.*, 104 N. Y. 669, 10 N. E. 855; *Fallon v. Central Park, etc., R. Co.*, 64 N. Y. 13; *Thurber v. Harlem Bridge, etc., R. Co.*, 60 N. Y. 326; *Mangan v. Brooklyn, etc., R. Co.*, 38 N. Y. 455; *Hartfield v. Roper*, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273; *Lifschitz v. Dry Dock, etc., R. Co.*, 67 App. Div. (N. Y.) 602, 73 N. Y. Supp. 888; *Coughlan v. Third Ave. R. Co.*, 7 App. Div. (N. Y.) 124, 39 N. Y. Supp. 1098; *Albert v. Albany Ry. Co.*, 5 App. Div. (N. Y.) 544, 39 N. Y. Supp. 430, affirmed, 154 N. Y. 780, 49 N. E. 1093; *Newdell v. Young*, 80 Hun (N. Y.), 364; *Foley v. N. Y. C., etc., R. Co.*, 78 Hun (N. Y.), 248, 28 N. Y. Supp. 816.

The rule as adopted in New York has been followed and applied in a number of States.

California.—*Roller v. Sutter St. R. Co.*, 66 Cal. 230, 5 Pac. 108; *Schierhold v. No. Beach, etc., R. Co.*, 40 Cal. 447.

on the left side. As they approached St. Paul street, on which the cars of the appellant run, and when they were about fifteen feet from the building line of its east side, the doctor checked his horse, and leaned forward beyond the side curtain of the buggy,

Indiana.—Jeffersonville, etc., R. Co. v. Bowen, 40 Ind. 545; Evansville, etc., R. Co. v. Wolf, 59 Ind. 89; Pittsburgh, etc., R. Co. v. Vining, 27 Ind. 513.

Iowa.—Walters v. Chicago, etc., R. Co., 41 Iowa, 71.

Kansas.—Atchison, etc., R. Co. v. Smith, 28 Kan. 541.

Kentucky.—Toner's Adm'r v. South Covington, etc., St. Ry. Co., 22 Ky. Law Rep. 564, 58 S. W. 439.

Maine.—Ladie v. Lewiston, 62 Me. 468; Brown v. European, etc., R. Co., 58 Me. 384.

Maryland.—Baltimore, etc., R. Co. v. McDonnell, 43 Md. 534.

Massachusetts.—Cotter v. Lynn & Boston R. Co., 180 Mass. 145, 61 N. E. 318; McGeary v. Eastern R. Co., 135 Mass. 363; O'Connor v. Boston, etc., R. Co., 135 Mass. 352.

Minnesota.—Ekman v. Minneapolis St. R. Co., 34 Minn. 24, 24 N. W. 291; Fitzgerald v. St. Paul, etc., R. Co., 29 Minn. 336, 13 N. W. 168.

Texas.—Payne v. Humeston, etc., R. Co., 70 Tex. 584.

Wisconsin.—Dahl v. Milwaukee City Ry. Co., 62 Wis. 652, 22 N. W. 755.

Notwithstanding the respectable array of authorities lined up in support of the so-called New York rule, there is a marked tendency in other jurisdictions to refuse to accept the rule as a true doctrine, and in a large number of cases we find the rule laid down that the contributory negligence of a parent, guardian, or custodian having the control and charge of a child is not to be imputed to the child itself, and is no defense to an action brought by the child for the recovery of damages for personal injuries. It is stated in Shearm. & Redf. Neg., § 78, that "such an overwhelming weight of authority, as well as of argument, entitles us to treat the so-called New York rule as obsolete." The following cases may be cited in opposition to the so-called New York rule:

Alabama.—Pratt Iron Co. v. Brawley, 83 Ala. 371, 3 So. 555, 3 Am. St. Rep. 761.

Arkansas.—St. Louis, etc., Ry. Co. v. Rexroad, 59 Ark. 180, 26 S. W. 1037.

Connecticut.—Daley v. Norwich, etc., R. Co., 26 Conn. 591.

Georgia.—Ferguson v. Columbus, etc., R. Co., 77 Ga. 102.

Kentucky.—South Covington, etc., St. R. Co. v. Herrklotz, 20 Ky. Law Rep. 750, 47 S. W. 265.

Louisiana.—Barnes v. Shreveport City R. Co., 47 La. Ann. 1218, 17 So. 782; Westerfield v. Levis, 43 La. Ann. 63, 9 So. 52.

Michigan.—Shippy v. Village of Ausable, 85 Mich. 280, 48 N. W. 584.

Missouri.—Winters v. Kansas City R. Co., 99 Mo. 509, 12 S. W. 652, 17 Am. St. Rep. 591, 6 L. R. A. 536 (in which case the court expressly renounced the doctrine laid down in the case of Hartfield v. Roper, 21 Wend. (N. Y.)

to see, as he testified, if any cars were in sight, but he neither saw nor heard any in either direction. From the point at which he thus looked he could have seen a car approaching from the north on the south-bound track on St. Paul street about forty or fifty

615, 34 Am. Dec. 273, and adhered to the contrary doctrine as asserted in the leading case of *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67; *Boland v. Missouri R. Co.*, 36 Mo. 484; *Frick v. St. Louis, etc., R. Co.*, 36 Mo. 490.

Nebraska.—*Huff v. Ames*, 16 Nebr. 139.

New Hampshire.—*Warren v. Manchester St. Ry. Co.*, 70 N. H. 352, 47 Atl. 735.

New Jersey.—*Markey v. Consol. Tract. Co.*, 65 N. J. L. 82, 46 Atl. 573; *Bergen County Tract. Co. v. Heitman*, 61 N. J. L. 682, 40 Atl. 651; *Consol. Tract. Co. v. Behr*, 59 N. J. L. 447, 37 Atl. 142; *Newman v. Phillipsburg, etc., Co.*, 52 N. J. L. 446, 19 Atl. 1102.

Ohio.—*St. Claire St. Ry. Co. v. Eadie*, 43 Ohio St. 91, 1 N. E. 519; *Cleveland, etc., R. Co. v. Manson*, 30 Ohio St. 451 (holding that as the doctrine of imputed negligence does not prevail in Ohio a child of tender years injured by the fault of another is not deprived of a right of action by reason of contributory negligence on the part of a parent or guardian); *Bellefontaine, etc., R. Co. v. Snyder*, 18 Ohio St. 400, 98 Am. Dec. 175.

Pennsylvania.—*Erie City Pass. Ry. Co. v. Schuster*, 113 Pa. St. 412, 6 Atl. 269, 57 Am. Rep. 471; *Philadelphia, etc., R. Co. v. Long*, 75 Pa. St. 257.

Tennessee.—*Dan v. Citizens' St. Ry. Co.*, 99 Tenn. 88, 41 S. W. 339; *Whirley v. Whitman*, 1 Head, 610.

Vermont.—*Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67.

Virginia.—*Norfolk & W. R. Co. v. Groseclose*, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718.

In Illinois it has been recently held that the negligence of a parent of a child six years old in allowing him to go across street car tracks with a boy of eleven years of age was not imputable to the child, so as to support the defense of contributory negligence to his action for injuries received through the negligence of the railway company. *Chicago City Ry. Co. v. Tuohy*, 196 Ill. 410, 63 N. E. 997. See also *Chicago City Ry. Co. v. Wilcox*, 138 Ill. 370, 27 N. E. 899.

b. *Action for death of child*.—Where the injuries complained of resulted in the death of the child, and an action is brought therefor by its legal representatives, it seems to have been held that the negligence of the parents of the child contributing to the injury will preclude a recovery, especially in those States where the doctrine of imputed negligence is applied in accordance with the rule in New York. See *Grant v. City of Fitchburg*, 160 Mass. 16, 35 N. E. 84, 39 Am. St. Rep. 449; *Apsey v. Detroit, L. & N. R. Co.*, 83 Mich. 432, 47 N. W. 319; *Weissner v. St. Paul City Ry. Co.*, 47 Minn. 468, 50 N. W. 606; *Ihl v. Forty-second St., etc., R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450; *Dahl v. Milwaukee City Ry. Co.*, 62 Wis. 652, 22 N. W. 755. If any distinction is to

feet before it reached the north side of Twenty-third street. Not seeing or hearing any car, he gave his horse a free rein, and started to cross St. Paul street; but, before he succeeded in getting across, the horse and buggy were struck by a car running very

be made in the case of an action brought for the death of a child by the child's legal representatives and an action brought by the child himself for the injuries, it would presumably be based upon the fact that the parents whose negligence contributed to the injuries would directly profit by the recovery had in an action by the child's administrator. But as suggested in the case of *Westerfield v. Levis*, 43 La. Ann. 63, 9 So. 52, the right of action for damages to the child is a subject of inheritance passing to the parents, and such right should not be affected by the fact that the negligence of the parents contributed to the injuries.

c. Action by parent.—If a suit is brought by a parent for his own benefit to recover damages for loss of service caused by an injury to his child, the contributory negligence of the parent in permitting the child to be placed in a position of danger will bar the parent's right of recovery. See *Shearm. & Redf. Neg.*, § 71; *Pratt Coal & Iron Co. v. Brawley*, 83 Ala. 371, 3 So. 555, 3 Am. St. Rep. 751 (in which case it was held that in an action by a father for personal injuries to his child caused by negligence, the contributory negligence of the father is a complete defense, without regard to the age or capacity of the child). See also *Bellefontaine Ry. Co. v. Snyder*, 24 Ohio St. 670; *Western Union Telegraph Co. v. Hoffman*, 80 Tex. 420, 15 S. W. 1048.

d. Exercise of care by child.—The so-called New York rule is not applied where the child itself does not do anything which would be negligence in a person of mature years. *Leavitt's Code of Negligence*, p. 202; *Pittsburgh, etc., R. Co. v. Bumstead*, 48 Ill. 221; *O'Brien v. McGlinchy*, 68 Me. 552; *McMahon v. Northern, etc., R. Co.*, 39 Md. 438; *Collins v. South Boston R. Co.*, 142 Mass. 301, 7 N. E. 856; *Lynch v. Smith*, 104 Mass. 52; *Cumming v. Brooklyn City R. Co.*, 104 N. Y. 669, 10 N. E. 855 (in which case it was held that where it appeared that the child exercised the degree of care and prudence required of a person *sui juris*, it was immaterial that the parents of the child were guilty of negligence in permitting it to be on the streets); *Ihl v. Forty-second St., etc., R. Co.*, 47 N. Y. 317; *Hennessey v. Brooklyn City R. Co.*, 6 App. Div. (N. Y.) 206, 39 N. Y. Supp. 805.

a. Negligence in permitting child to go on street.—In those States where the negligence of the parents or custodian of a child is imputed to the child in an action for injuries to the child, it has been held that it was negligence to permit a child of tender years to go upon the street unattended, where the circumstances were such as to make the child's presence upon the street dangerous to him, and this fact was known or should have been known by the parent. The difficulty usually arises in determining the age at which it will be deemed negligence on the part of the parents to permit a child to go abroad upon the streets unattended or not sufficiently attended. This question is

rapidly southerly on the south-bound track, and were dragged to a point about twenty feet south of Twenty-third street, and the appellee was injured. The doctor, the appellee, and an eyewitness of the collision, who was standing at the corner of the two streets when it occurred, all testified that they heard no gong ring on the approaching car, although each of them thought he would have heard it if it had been rung. The appellee further testified that he saw his brother, as they neared St. Paul street, check his horse and lean forward in his buggy and look out for the cars before he started to cross; and, further, that the first warning they had of the approach of the car was a cry from some one to "look out," and that the crash of the collision came almost simultaneously with the cry. Another eyewitness of the collision, who at the time was standing on the west side of St. Paul street, a short

usually for the jury to determine. For instance, it has been held negligence for the parent of a child three years of age to permit such child to go upon the street unattended where the street at the time was usually crowded with teams. *Casey v. Smith*, 152 Mass. 294, 25 N. E. 734, 23 Am. St. Rep. 842, 9 L. R. A. 259. And when a child of two years and four months of age is sent alone across a public street by his father, who, after looking to see whether there is anything dangerous in sight, turns away, and exercises no further oversight or care in respect to the child, there is such a want of reasonable care as to preclude a recovery by the child for injuries sustained by being run over while crossing the street. *Callahan v. Bean*, 9 Allen (Mass.), 410. The permitting of a child four years old to be upon the streets without a protector is negligence of the parents, precluding recovery by the child for injuries received, although the fact of his being alone at the moment of the injury is not conclusive as to such negligence, but admits of proper and sufficient explanation, when such can be made. *Mangan v. Brooklyn City R. Co.*, 36 Barb. (N. Y.) 230, affirmed, 38 N. Y. 455, 98 Am. Dec. 66. It has been held that where a child of an age too tender to charge it with contributory negligence is run over by a wagon in the street, the negligence of its mother in sending it on the street unattended must be imputed to it. *Dudley v. Westcott*, 18 N. Y. Supp. 130. The permitting of a child of five years of age to be upon a street unattended, where there was no particular reason to apprehend danger, and in a street almost entirely unused, would not, as a matter of law, be held evidence of negligence on the part of the parent, precluding recovery by the child for injuries received. *Karr v. Parks*, 40 Cal. 188. See also *Daly v. Hinz*, 113 Cal. 366, 45 Pac. 693.

The negligence of a parent in suffering a child to go upon a public street, unattended, when it is too young to exercise proper care of itself, will not preclude a recovery for injuries sustained by it from the negligence of a third

distance north of the corner, testified that he heard the gong ring on the car when it was about fifty feet north of Twenty-third street, and that the buggy was then in sight, coming out of Twenty-third street, and that the motorman was turning the brake, endeavoring to stop the car, but did not succeed in doing so until it had reached the steps of the second house south of Twenty-third street.

After the evidence was all in, the appellee, as plaintiff, offered four, and the defendant offered thirteen, prayers. The court granted all of the plaintiff's prayers, and eight of the defendant's, and rejected its remaining five prayers. The plaintiff's third prayer, which took the defense of contributory negligence on the part of the plaintiff out of the case, presents the real issue in controversy, and it formed the basis of the entire argument before

person, if, while on the street, it did nothing which could be deemed careless, if its movements had been directed by an adult person of ordinary and reasonable prudence. *Wiswell v. Doyle*, 160 Mass. 42, 35 N. E. 107, 39 Am. St. Rep. 451.

The question as to whether the custodian of a child exercised proper care in protecting the child is for the jury. *Mangan v. Brooklyn City R. Co.*, 36 Barb. (N. Y.) 230, affirmed, 38 N. Y. 455, 98 Am. Dec. 66; *Ehrman v. Brooklyn City R. Co.*, 60 Hun (N. Y.), 580, 14 N. Y. Supp. 336.

f. **Negligence in failing to avoid injury to child.**—A child who is injured by being struck by a street car or otherwise, which injury was contributed to by the parents of such child, can recover for such injury if it might have been avoided by the exercise of ordinary care upon the part of the defendant. *Government's St. R. Co. v. Hanlon*, 53 Ala. 70; *Chicago, etc., Ry. Co. v. Ryan*, 131 Ill. 474, 23 N. E. 385; *Baltimore City Pass. Ry. Co. v. McDonnell*, 43 Md. 534; *Cadmus v. St. Louis Bridge & Tunnel Co.*, 15 Mo. App. 86; *Bisaillon v. Blood*, 64 N. H. 565, 15 Atl. 147; *Erie City Pass. Ry. Co. v. Schuster*, 113 Pa. St. 412, 6 Atl. 269, 57 Am. Rep. 471.

5. **Other cases reported in this series.**—As to negligence of parents or custodians imputed to children, see *Mellen v. Old Colony St. Ry. Co.*, 2 St. Ry. Rep. 427, (Mass.) 68 N. E. 679; *Carney v. Concord St. Ry.*, 2 St. Ry. Rep. 668, (N. H.) 57 Atl. 218; *McDermott v. Boston Elev. Ry. Co.*, 1 St. Ry. Rep. 325 (Mass.), 68 N. E. 34; *Lafferty v. Third Ave. R. Co.*, 1 St. Ry. Rep. 605, 85 App. Div. (N. Y.) 592, 83 N. Y. Supp. 405. As to negligence of driver of vehicle imputed to person riding with him, see *United Rys. & Elec. Co. v. Beadler*, 2 St. Ry. Rep. 391, (Md.) 56 Atl. 813; *Baxter v. St. Louis Transit Co.*, 2 St. Ry. Rep. 612, (Mo. App.) 78 S. W. 70; *Geary v. Metropolitan St. Ry. Co.*, 1 St. Ry. Rep. 581, 84 App. (N. Y.) 514, 82 N. Y. Supp. 1016; *Cain v. Traction Co.*, 1 St. Ry. Rep. 657, 48 Ohio Law Bull. 1.

this court. That prayer is as follows: "The court, at the plaintiff's request, instructs the jury that if they find the facts set forth in the plaintiff's first prayer, and further find that, at the time of the accident therein referred to, the plaintiff was an invited guest in said buggy, and that he exercised no control over the driving and the management of the same, but that the said buggy, and horse drawing the same, was owned by the witness Dr. H. H. Biedler, and that the said Dr. Biedler was driving and controlling said buggy, that even if they find that the said Dr. Biedler was guilty of negligence in the manner in which he managed and drove said horse and buggy, which contributed to the happening of the accident, that, as a matter of law, the negligence of Dr. Biedler cannot be imputed to the plaintiff, and forms no bar to the right of recovery of the plaintiff in this case against the defendant; and, further, that there is no evidence in this case legally sufficient to show any negligence on the part of the plaintiff, directly contributing to the happening of the injury complained of."

The first proposition asserted by this prayer is that the contributory negligence, if any there were, on the part of Dr. Biedler, the owner and driver of the buggy at the time of the accident, cannot be so imputed to the appellee, who was a mere passenger, as to afford to the defendant an excuse or defense for an injury to him caused by its negligence. The rejection made by this prayer of the doctrine of imputed negligence in cases like the one now under consideration is in entire accord with the previous decisions of this court. In the case of *P., W. & B. R. Co. v. Hogleland*, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159, the plaintiff, by invitation of her brother-in-law, was riding with him in a carriage, which, together with the horse that drew it, were hired by him, and were under his exclusive control and direction. The carriage was struck by a passing train when attempting to cross a railroad track, and she was injured by the collision. She sued the railroad company for damages sustained by reason of her injury, and in the course of the trial the court rejected several prayers offered by the defendant denying the right of the plaintiff to recover if the jury found that Richardson, the driver of the carriage, had been guilty of negligence directly contributing to the happening

of her injury. This court, on an appeal, affirmed the action of the lower court in rejecting the prayers, and, after a careful and thorough discussion of the whole doctrine of imputed negligence, and an examination of the authorities on the subject, held that the negligence of the driver could not be imputed to the plaintiff, who was, as was the present plaintiff, a mere passenger, without direction or control over the carriage or its driver. In the case of *Balto. & Ohio R. Co. v. State*, 79 Md. 335, 29 Atl. 518, 47 Am. St. Rep. 415, this court was asked by the appellant to modify the doctrine laid down in *Hogeland's case*, but it refused to do so, saying:

"It is the generally accepted doctrine of the courts of this country that the contributory negligence of a carrier or the driver of a public or private vehicle not owned or controlled by the passenger, and who is himself without fault, will not constitute a bar to the right of the passenger to recover for injuries received. The only principle upon which such contributory negligence could bar the right of recovery is that the driver should be regarded as the agent or servant of the passenger."

There is no ground for holding the appellee in the present case to have been the principal or master, for it is conceded that he was the mere guest of his brother, who owned and controlled both the horse and buggy at the time of the accident.

Nor do we think that there is any evidence in the record from which a fair mind could reasonably infer that the appellee was himself guilty of any want of such care as could reasonably have been expected of a person of ordinary prudence under the circumstances of the case. He knew that his brother was a skillful and experienced driver, who had for many years been traversing the streets of Baltimore in just such a vehicle as that in which they were then driving. He saw his brother check his horse as they approached the crossing of St. Paul street, and lean forward beyond the side curtain and look and listen, and then proceed to make the crossing. From the position in which the appellee sat, on the south side of the buggy, he could not have seen through the small light in the curtain of the buggy on the north side, from which the car was approaching, for his brother sat between him and that light. Even if he had been warned of the approach of the car, there is no evidence that he could have escaped from

the buggy in time to save himself. At the rate at which the buggy was going, but a few seconds must have elapsed after he saw his brother, who was in charge of the vehicle, check his horse and look and listen for a car, before the swiftly approaching car struck them. For him to have attempted at such a juncture to interfere with the driver of the vehicle would have laid him open to the charge of negligence, rather than of care. He did not own or control the horse or vehicle, and there is no evidence from which it can be reasonably inferred that he could in those few seconds have successfully checked his brother from attempting the crossing which the latter, after having checked his horse and looked and listened, thought he could safely make. Under these circumstances, we are of opinion that no error was committed by the learned judge below in granting the plaintiff's third prayer.

The appellant, in the argument of the case, made no serious objection to the action of the court below upon the other prayers, nor do we, upon an inspection of the record, find any error in such action; and we will, therefore, affirm the judgment appealed from.

Judgment affirmed, with costs.

Jones v. United Railways & Electric Co. of Baltimore.

(Maryland — Court of Appeals.)

1. INJURY TO PASSENGER BY BEING STRUCK BY A PASSING WAGON; PRESUMPTION OF NEGLIGENCE.—The plaintiff was a passenger on an open car of the defendant and sat upon a seat at the side of the car with his arm upon a brass rail at the top of a low wire netting running along the sides of the car. He was struck and injured by a marble slab projecting from a passing wagon, which collided with the car. It was held that the occurrence of the accident raised a presumption of negligence on the part of the defendant, and that the burden was upon it to show that the injury did not result from its negligence, or that the plaintiff was himself guilty of negligence, directly contributing to its occurrence.

See also *Cumming v. Wichita R. & L. Co.*, 2 St. Ry. Rep. 278, (Kan.) 74 Pac. 1104; *Houston Elec. Co. v. Nelson*, 2 St. Ry. Rep. 906, (Tex. Civ. App.) 77 S. W. 978; *Zeliff v. North Jersey St. Ry. Co.*, 1 St. Ry. Rep. 541 (N. J. L.), 55 Atl. 96.

2. CONTRIBUTORY NEGLIGENCE.—In view of the plaintiff's testimony that he neither saw nor heard the collision between the stone on the wagon and the side posts of the car, and was unaware of the approaching danger, until he was struck and injured, it was for the jury to determine as to whether the plaintiff was guilty of such contributory negligence as to deprive him of the right to recover. A passenger is not required to be constantly on the lookout for danger; he may presume, while exercising ordinary care and prudence on his own part, that the carrier will discharge its duty toward him as its passenger and exercise that high degree of care for his protection which the law requires of it.

APPEAL by plaintiff from judgment in favor of defendant. Decided March 22, 1904. Reported (Md.), 57 Atl. 620.

John P. Poe, for appellant.

J. Pembroke Thom and *George D. Penniman*, for appellee.

Opinion by SCHMUCKER, J.

The appellant sued the appellee in the Superior Court of Baltimore city to recover damages for an injury suffered by him while riding in one of its electric street cars. At the close of the plain-

Passengers injured by collision with vehicles in street.—The driver or motorman of a street car, notwithstanding his car has a superior right of way, should stop or slacken his speed to avoid imminent danger from collision with vehicles upon the street; and the fact that the collision occurs by reason of the negligence of the driver of the other vehicle will not relieve the carrier from liability for its negligence proved to have been the efficient and proximate cause of the injury. The degree of caution and vigilance to be exercised in avoiding collision with other vehicles is greater where the street car is an open one with passengers sitting near the ends of the seats when a collision would almost necessarily result in injury, than would be demanded in the management of closed cars, and if there be any element of negligence in the case, it must be submitted to the jury. *Nellis Street Railroad Accident Law*, p. 167.

A street railroad company is not necessarily free from liability to a passenger injured in a collision between one of its cars and a wagon because a wagon struck the car instead of the car striking the wagon. *Keegan v. Third Ave. R. Co.*, 34 App. Div. (N. Y.) 297, 54 N. Y. Supp. 391; *Loudoun v. Eighth Ave. R. Co.*, 16 App. Div. (N. Y.) 152, 44 N. Y. Supp. 742 (rev'd 162 N. Y. 380). A street railroad company is bound to exercise all the care and skill which human prudence and foresight can suggest to prevent a collision with a passing vehicle and thus avoid injuries to passengers. *Zimmer v. Third Ave. R. Co.*, 36 App. Div. (N. Y.) 265, 55 N. Y. Supp. 368. The fact that the driver of the vehicle makes

tiff's evidence the court granted the defendant's prayer instructing the jury that the uncontradicted evidence showed the plaintiff to have been guilty of negligence directly contributing to the accident, and directing them to render a verdict for the defendant. The verdict was rendered accordingly, and from the judgment entered thereon the plaintiff appealed.

The plaintiff testified in his own behalf as follows: About 5 o'clock on the afternoon of August 20, 1902, he got into the car at Govanstown, to go to his home in Baltimore, and paid his fare. The car was a long eight-wheeled one, with an aisle through its center, and the seats placed in pairs on the two sides of the aisle. The windows and sides of the car, with the exception of the up-

no attempt to avoid a collision does not relieve the company of liability for the negligence of its motorman in failing to stop his car or to use all reasonable efforts so to do. The rule that the motorman has a right to assume that a wagon on the track will move out of the way, until something appears showing that it cannot move, does not apply to an action by a passenger against the company for injuries sustained in a collision with a broken-down wagon upon the track, but the passenger has the right to assume that he will be carried safely, and that the motorman will see the obstruction and stop in time to prevent a collision. *Sweeny v. Kansas City Cable R. Co.*, 150 Mo. 385, 51 S. W. 582; *Sears v. Seattle Cons. St. R. Co.*, 6 Wash. 227, 33 Pac. 389.

A street railway company may be liable to a passenger for injuries resulting from a collision caused by the motorman's want of a high degree of care in preventing a collision with a hook and ladder wagon going to a fire, although the negligence of the driver of the wagon may have contributed to the accident. *Olsen v. Citizens' Ry. Co.*, 152 Mo. 426, 54 S. W. 470.

The liability of a street railway company may be affected by the fact that the collision was a result of a sudden emergency, in which case a failure of the motorman to exercise the best judgment which the circumstances rendered possible cannot be claimed as lack of skill or care. *Wynn v. Central Park, etc., R. Co.*, 133 N. Y. 573, 30 N. E. 721. Thus, in the case of *Alexander v. Rochester City R. Co.*, 128 N. Y. 13, 27 N. E. 950, where the plaintiff was a passenger on one of the defendant's street cars, when a wagon loaded with lumber, passing along the adjoining track, in an opposite direction, turned suddenly abreast of the car, and the lumber projecting from the load struck the plaintiff, inflicting the injuries complained of, and the car driver applied his brake on seeing the wagon turn, it was held that, irrespective of the rate of speed at which the car was moving, there was no evidence of negligence imputable to the defendant, and it was error to submit the case to the jury. And where, in an action against a street car company for personal injuries sustained by a passenger from a collision between a car and a wagon, it appeared that the wagon was approaching from the direction toward which the

right posts, had been removed, so as to make it an open car. Between each two of the posts along the sides of the car there was a low wire netting with a narrow brass rail on top of it. All of the seats were double seats except those at the two ends of the car, where there was a double seat on one side of the aisle and a single seat on the other side. The plaintiff, on entering the car, took the single seat at its rear end. While sitting there, with his elbow on the brass railing, but entirely within the car, the upper part of his arm, near the shoulder, was struck and injured by a marble slab which projected from a passing wagon that collided with the car. His recollection was that the car and wagon were going in opposite directions at the time of the accident. He neither saw

car was going, and that because of the heavy load the driver was unable to turn out as quickly as he might ordinarily have done, as a result of which the stanchions in the middle of the car struck the rear bags of cotton with which the wagon was loaded, shattering the handles and injuring the plaintiff by flying splinters, it was held that the situation was not one from which grave injury might have been expected, and hence a charge that the street railroad company was bound to exercise the highest degree of care and skill which human foresight could provide, was erroneous. *Conway v. Brooklyn Hts. R. Co.*, 81 N. Y. Supp. 878. In the case of *Potts v. Chicago City Ry. Co.*, 33 Fed. 610, the plaintiff was a passenger on one of the defendant's cable cars, and was injured by the shafts of a wagon being projected into the car in which he sat; it was held that the defendant's liability depended upon whether there was anything connected with the actions of the horse drawing the wagon or its driver from which the gripman could reasonably infer that a collision might occur.

In the case of *Hill v. Ninth Ave. R. Co.*, 109 N. Y. 239, 16 N. E. 61, the plaintiff was riding in one of the defendant's street cars, which was being driven with unusual speed, when it was struck by the pole of a truck which penetrated through the front of the car, throwing the plaintiff from her seat and injuring her; it was held that the plaintiff was improperly nonsuited; that it was not a reasonable or natural inference that such an accident happened without some carelessness on the part of the driver of the car, and that the driving at an unusual rate of speed was one cause or occasion of the accident which called for an explanation, and required a submission of the case to the jury.

In the case of *Moylan v. Second Ave. R. Co.*, 128 N. Y. 583, 27 N. E. 977, it appeared that the plaintiff was a man twenty-six years old, ablebodied, and unincumbered; he waited for one of the defendant's open cars upon a crosswalk and motioned for it to stop; when it had nearly stopped he put his foot on the step on the side of and near the middle of the car, and took hold of the stanchion, and after the car had moved six or seven feet, he was struck by

nor heard the wagon before the stone struck him, nor had he any warning of its approach.

John M. Russell, an eyewitness of the accident, testified for the plaintiff that he was sitting in the car on the opposite side from the plaintiff, and saw the latter struck by the stone slab. His description of the accident was as follows:

"Well, going along up Fayette street I heard a screeching noise, which drew my attention—a kind rubbing noise until it got louder; and I noticed this piece of marble some distance from the colored man, and it was screeching along the car, and it was a wagon loaded with slabs of marble in it, and the slabs projected over the wagon, and this slab that was out must have been a little further than the others. I don't know whether they might

the wheel of a truck which was standing in the street; it was held that a refusal to nonsuit was error; that it was the plaintiff's duty to see, before getting on the car, that there was no obstacle outside the car which would make it dangerous for him to attempt to get on board; and that if the injury was attributable to any negligence, it was, in part at least, that of the plaintiff. In the case of *Wood v. Brooklyn City R. Co.*, 5 App. Div. (N. Y.) 492, 38 N. Y. Supp. 1077, the plaintiff was riding on the step which runs along the side of an open street car, the car being crowded, and as the car proceeded, a team of horses drawing a truck was being watered at a trough at the curb, the team and truck standing diagonally across the street, leaving a space, which, at the time the motorman approached and sought to run his car past it, was sufficiently wide for the car to have passed without injury, but the evidence tended to show that the truck was backed somewhat while the car was passing, and as the car passed the plaintiff was struck by the end of the truck, and was injured; it was held that the question of contributory negligence should have been submitted to the jury; that the motorman should have considered the fact that there was liability of collision from the horses backing away from the trough after they had finished drinking.

Instruction as to degree of care.—An instruction that it is the duty of a driver of a street car to exercise the highest degree of care to avoid a collision with a vehicle in the street, that his first and highest duty is to secure the safety of his passengers, and, to do that, he should exercise all the care that prudence might suggest in looking about and listening, so as to assure himself that the track was clear and safe; and that his duty is greater at a street crossing than at other ordinary places, does not hold the defendant to a stricter responsibility than the law imposes. *Heucke v. Milwaukee City Ry. Co.*, 69 Wis. 401, 34 N. W. 243.

In the operation of street cars the highest degree of care is required to avoid collision with vehicles, or other cars or temporary obstructions, on the track or so near to it that danger may be apprehended therefrom. 6 Cyc. 625, and cases cited.

have been all out. I didn't notice that; but when it got close I seen it when it caught the old fellow's arm and kind of pulled him around that way [indicates]; and after it crossed Calvert street I thought the conductor had seen it, too, for he was standing on the back platform." He further testified that as the marble slab passed along the posts at the side of the car it struck each post and made a loud screeching noise, 'quite enough to attract anybody's attention on board that car; * * * anybody who had any hearing at all;' that the two vehicles were going in the same direction at the corner of Calvert and Fayette streets, and that 'the car had stopped on Fayette street and started before it caught this wagon; the wagon was going on, and, of course, it got into the narrows; there was where it caught the car; it caught the wagon right in the narrows, and the further they both went the tighter they got.' "

That the conductor did not stop the car until it got to St. Paul street. The witness took the plaintiff from the car at Charles street, and assisted him to a hospital. He seemed to be in a dazed condition at the time.

The appellant, when injured by the collision of the car with the stone wagon, was a passenger in the car, had paid his fare, and was occupying one of the seats provided by the appellee for the use of its passengers. His elbow, although resting upon the brass rail at his side, did not project beyond the car. Under these circumstances the law in this State is clear that the occurrence of the accident by which he was injured raised the presumption of negligence on the part of the appellee, and the *onus* was cast upon the latter to show that the injury did not result from its negligence, or that the appellant was himself guilty of negligence directly contributing to its occurrence. *Railroad Co. v. State, to Use Mahone*, 63 Md. 135; *B. & O. R. Co. v. Hauer*, 60 Md. 462; *B. & P. R. Co. v. Swann*, 81 Md. 400, 32 Atl. 175, 31 L. R. A. 313; *Hewes v. P. W. & B. R. Co.*, 76 Md. 159, 24 Atl. 325.

The appellee offered no evidence in its own behalf, but asked the court to rule that the uncontradicted evidence offered on the part of the plaintiff established the fact that he was guilty of such contributory negligence as debarred his right to recover. The learned judge granted the prayer of the appellee, but we are unable to agree with his view of the case. The appellant distinctly testified that he neither saw nor heard the collision between the stone on the wagon and the side posts of the car, and was unaware of the approaching danger until he was struck and injured. There

is no direct contradiction of this testimony. It is true that the witness Russell, who was on the opposite side of the car, both saw and heard the collision, and said that, in his opinion, it made a noise loud enough to be heard by any one in the car who had any hearing at all. This evidence as to the loudness of the noise, although in the nature of an opinion, was proper to be considered by a jury along with the other testimony, but it does not amount to a contradiction or disproof of the plaintiff's testimony already mentioned. We held in *Hogeland's case*, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159, as well as in more recent cases decided upon its authority, that one who is in a position of danger — as when nearing a railroad crossing — must exercise precautions appropriate to his situation, and must look and listen for approaching trains, and that under such circumstances it will not do for him to say that he looked and did not see, and listened and did not hear, the train, when the facts of the case show that, if he had looked or listened with the requisite care, he must have seen or heard it. But a passenger traveling in a street car is not bound as is a person approaching a dangerous crossing to keep all of his senses alert, and be constantly on the lookout for danger. He has, while exercising ordinary care and prudence on his own part, a right to presume that the railway company in whose cars he is traveling will discharge its duty toward him as its passenger and exercise that high degree of care for his protection which the law requires of it. It may be that, with all of the facts of the case before them, a jury would come to the conclusion that the appellant was guilty of such contributory negligence as to deprive him of the right of recovery, but, in our opinion, that fact does not at present appear from the uncontradicted evidence now in the case. The mere belief expressed by the one witness Russell that any one in the car could have heard the noise of the collision before the stone projecting from the colliding wagon reached the seat in which the appellant sat might not, in the opinion of the jury, be sufficient to destroy the value of the latter's testimony that he neither saw nor heard it before he was struck. The question of negligence in cases like this is primarily one for the jury under proper instructions from the court defining the degree of care required of each party. It is only where the facts are undis-

puted, or where but one reasonable inference can be drawn from them, that it is proper to take the case from the jury. *B. & O. R. Co. v. Dougherty*, 36 Md. 366; *Cumb. Valley R. Co. v. Maugans*, 61 Md. 60, 48 Am. Rep. 88; *Cooke v. Baltimore Traction Co.*, 80 Md. 558, 31 Atl. 327; *Con. Ry. Co. v. Rifcowitz*, 89 Md. 342, 43 Atl. 762. We think appellant is entitled to have his case passed on by a jury, and we will, therefore, reverse the judgment. Judgment reversed, with costs, and new trial awarded.

Dooley v. Greenfield & Turner's Falls Street Railway Co.

(Massachusetts — Supreme Judicial Court, Franklin.)

COLLISION WITH PEDESTRIAN; CONTRIBUTORY NEGLIGENCE.—The plaintiff's intestate was struck and killed by one of the defendant's street cars. The evidence was conflicting as to the way in which the accident occurred. It appeared from the plaintiff's evidence that he stepped upon the track to avoid travelers approaching him on the street, and was struck by the car from the rear. In the absence of evidence showing that he exercised due care in stepping from the track out of the way of the car the plaintiff could not recover since his intestate was not shown free of contributory negligence.

EXCEPTIONS by plaintiff from judgment for defendant. Decided October 20, 1903. Reported 184 Mass. 204, 68 N. E. 203.

Winn & Griswold and *A. L. Green*, for plaintiff.

Dana Malone, for defendant.

Opinion by BARKER, J.

The plaintiff's intestate was run over and dragged along the ground for some distance by one of the defendant's street cars on September 12, 1902, and was dead when picked up. The action was for negligently causing his death. The motorman of the car and three passengers testified that the deceased was lying on the track between the rails when first seen by them, and that he lay motionless until struck and dragged by the car

almost instantly after he first became visible to them, and there was no evidence to contradict this testimony. The evidence which the plaintiff contends should have been submitted to the jury upon the question whether the deceased came to his death while in the exercise of due care was that of four persons who testified that they were riding upon the highway in wagons drawn by horses, and of one person who was riding a bicycle, all going in the direction opposite to that of the deceased and of the street car, and that shortly before the accident they met the deceased walking in the highway in the opposite direction to that in which these witnesses were going. This evidence, if believed, would justify an inference that when seen by these witnesses the deceased was walking along the highway toward his home. . Three of these witnesses testified that they were in one wagon, and this wagon was the earlier of the two to meet the deceased. The bicyclist was alone, and met the deceased after the meeting between him and the first wagon. The other of these witnesses testified that he was alone in a wagon which rattled and made much noise, and that he was driving at the rate of eight or nine miles an hour. The highway was fifty-five feet wide, with the car track within its limits, and south of its center line. North of the center line was a macadam driveway, twenty-six feet wide. At the place where the deceased was struck, a pathway made smooth by the use of foot travelers and bicyclists ran along between the rails of the car track. According to the testimony of the witnesses who testified that they were in the first wagon, the defendant, when seen by them, was walking next to the inside rail of a curve, and on the outside of the rail next to the highway. The bicyclist testified that the deceased was walking outside of the rails when he first saw him, and that the deceased stepped between the rails to get out of the way of the bicycle. The witness who testified that he was riding in the second wagon testified that the deceased was walking between the rails. The night was cloudy, with a strong wind, which blew in the direction opposite to that in which the car was moving, and which made a great noise in the trees. Neither of the witnesses who testified to meeting the deceased walking saw anything of the accident, or knew until the next day that an accident happened. The plaintiff admits that when the deceased was met by the first

wagon the car was more than half a mile away, and that it was not in sight when the deceased was met by the bicyclist. The witness who testified that he rode in the second wagon testified that when he passed the deceased the car was from twenty to thirty feet away from the deceased, and that the witness did not see the car stop, and did not stop himself, and that the deceased was walking along, looking ahead, and did not turn his head either way to right or left. He also testified that he said nothing to the deceased, and did not warn him that the car was coming, or say anything to him whatever; that he did not stop to see if any accident happened, because he did not think there would be any; that he supposed the deceased would get off the track. Unless it was competent for the jury to find from the evidence that the deceased did for his own safety what ordinarily careful persons are accustomed to do under like circumstances, the verdict for the defendant was ordered rightly, because of the plaintiff's failure to show that his intestate was in the exercise of due care. Assuming that the jury might find, against the testimony of the four witnesses who swore that they saw the deceased lying on the track between the rails, that he was walking between the rails to avoid a wagon approaching him in front, and that when the wagon passed him the car was approaching him from behind, and was only twenty or thirty feet distant, under such circumstances an ordinarily careful person would step off the track, and out of the way of the car, as the witness who testified that he saw the deceased in such circumstances testified that he expected him to do. There was no testimony that the deceased was so walking when struck by the car, and, even if it could be so inferred, no reason consistent with his due care for his continuance upon the track could be drawn, except by conjecture. In our opinion, there was no sufficient evidence to justify the submission of the case to a jury. See *Hillyer v. Dickinson*, 154 Mass. 502, 28 N. E. 905; *Brooks v. Old Colony R. Co.*, 168 Mass. 164, 64 N. E. 566.

Exceptions overruled.

Aiken v. Holyoke Street Railway Co.

(Massachusetts — Supreme Judicial Court, Hampden.)

1. **WANTON AND RECKLESS INJURY; CONTRIBUTORY NEGLIGENCE.**—The plaintiff, a boy of six and one-half years of age, was upon the lower step at the forward end of one of the defendant's cars as it was going around a curve from one street into another, and was clinging to the step attempting to get himself into a stable position; notwithstanding the fact that the motorman saw the plaintiff's danger he turned on the power in a wanton and reckless way, with a view to start the car quickly, resulting in throwing off the plaintiff and injuring him. It was held that the plaintiff's failure to exercise ordinary care for his safety was not a good defense in view of the reckless omission of duty on the part of the motorman; the conduct of a plaintiff which would be negligence precluding recovery if the injury were caused by ordinary negligence of the defendant will not commonly preclude recovery if the injury is inflicted willfully, through wanton carelessness.

As to injuries to children riding upon street cars without permission, see *Monehan v. South Covington, etc., St. Ry. Co.*, 2 St. Ry. Rep. 312 (and note), 25 Ky. Law Rep. 1920, 78 S. W. 706; *Albert v. Boston Elev. Ry. Co.*, 2 St. Ry. Rep. 448, (Mass.) 70 N. E. 52; *Chicago City Ry. Co. v. O'Donnell*, 2 St. Ry. Rep. 147, (Ill.) 69 N. E. 882.

Contributory negligence as affected by wanton and reckless injury.—Contributory negligence on the part of a person injured will not relieve the person causing the injury from responsibility if such injury was wanton and reckless. *Louisville, etc., R. Co. v. Hurt*, 101 Ala. 34, 13 So. 130; *Florida Southern Ry. Co. v. Hurst*, 30 Fla. 1, 11 So. 506, 32 Am. St. Rep. 17, 16 L. R. A. 631; *Central R. & Banking Co. v. Newman*, 94 Ga. 560, 21 S. E. 219; *Louisville, etc., Ry. Co. v. Wurl*, 62 Ill. App. 381; *Chicago, St. L. & P. R. Co. v. Billa*, 118 Ind. 221, 20 N. E. 775; *Lafayette & S. R. Co. v. Adams*, 26 Ind. 76; *Indianapolis & C. R. Co. v. McClure*, 26 Ind. 370, 89 Am. Dec. 467 (in which case it was held that if the wrong on the part of the defendant is so wanton and gross as to imply a willingness to inflict the injury, the plaintiff may recover, notwithstanding his own ordinary negligence); *Thurman v. Louisville & N. R. Co. (Ky.)*, 34 S. W. 893; *Christian v. Illinois Cent. R. Co. (Miss.)*, 12 So. 710. Where death results from an injury through the willful negligence of the defendant, the defense of contributory negligence is not available. *Louisville & N. R. Co. v. Coniff's Adm'r*, 16 Ky. Law Rep. 296, 27 S. W. 865; *Martin v. Wood*, 52 Hun (N. Y.), 613, 5 N. Y. Supp. 274.

When the defendant has inflicted an injury intentionally, or when he has done so unintentionally, yet his conduct, though still within the domain of negligence, has been wanton or reckless of its injurious consequences, or in other words, he has been guilty of what is now called, it may be inaptly,

2. **INSTRUCTION AS TO ORDINARY CARE OF PLAINTIFF.**—An instruction to the jury that in reference to ordinary kinds of care to avoid an injury from a car, the plaintiff need not show that he was in the exercise of due care, if a lack of such care would have no tendency to cause the willful and wanton injury, is proper. The fair interpretation of such an instruction is that it referred to ordinary kinds of care to avoid an injury from an electric car.
3. **LIABILITY FOR ACTS OF SERVANTS.**—An instruction that the master is liable for the acts of his servant done recklessly and willfully in the course of his employment is correct.

EXCEPTIONS by defendant from verdict for plaintiff. Decided October 21, 1903. Reported 184 Mass. 269, 68 N. E. 238.

A. L. Green and F. F. Bennett, for plaintiff.

Brooks & Hamilton, for defendant.

Opinion by KNOWLTON, C. J.

The most important question in this case grows out of the instructions to the jury upon the third count. This count charges the defendant, by its servants, with having started up the car recklessly, wantonly, and with gross disregard of the plaintiff's safety, while he was in a place of great peril upon the step of the car, and with having thrown him upon the ground and under the wheels

"willful negligence," the contributory negligence of the plaintiff is not a defense. Beach Cont. Neg. (2d ed.), §§ 61-64; Brannen v. Kokomo, etc., Road Co., 115 Ind. 115, 17 N. E. 202, 7 Am. St. Rep. 411; Banks v. Highland St. Ry. Co., 136 Mass. 485.

Wanton injury of trespasser.—The fact that the plaintiff was a trespasser upon the lands or property of the defendant while the act which produced the injury complained of was done will not necessarily preclude a recovery for such injury. Birge v. Gardner, 19 Conn. 507, 50 Am. Dec. 261; Norris v. Litchfield, 35 N. H. 271, 69 Am. Dec. 546; Lowe v. Salt Lake City, 13 Utah, 91, 44 Pac. 1050, 57 Am. St. Rep. 708. A person injured by the negligence of another is not barred of his remedy by the fact that at the time of the injury he was nominally trespassing upon the premises of the person injuring him, if his trespass does not involve negligence on his own part, substantially contributing to produce the injury. Daley v. Norwich, etc., R. Co., 26 Conn. 591, 68 Am. Dec. 413.

If the negligence of the defendant was so gross as to imply a disregard of the consequences, or a willingness to inflict the injury, the fact that the person

of the car. There was evidence tending to show that the plaintiff, a boy six and one-half years of age, ran near or against the car, and was upon the lower step at the forward end as the car was going around a curve from one street into another, and was clinging to the step, trying to get into a stable position, and that he there cried out to the motorman, "Let me off!" that the motorman saw and heard him, and knew that he was in a place of danger, and that he then turned on the power in a wanton and reckless way, with a view to start the car quickly; and that the plaintiff was thus thrown off and injured. This testimony was contradicted, but it was proper for the consideration of the jury. The judge instructed the jury that, if they found the facts to be in accordance with this contention of the plaintiff, they would be warranted in finding that the conduct of the motorman was wanton and reckless and in returning a verdict for the plaintiff. He also instructed them that, to maintain the action on this ground, it must be proved that the motorman willfully and intentionally turned on the power with a view to making the car start forward rapidly and go at full speed quickly, but that it was not necessary to prove that he did this with the intention of throwing the boy off and injuring him. He also told them that, to warrant a recovery upon this state of facts, the plaintiff need not show that he was in the exercise of due care. The defendant excepted to that part of the instruction which relates to due care on the part of the plaintiff.

The defendant contends that, while it was not necessary for the plaintiff to show due care anterior to the act of the motorman,

injured was a trespasser on the premises or property of another will not preclude him from recovering. *Hector Mining Co. v. Robertson*, 22 Colo. 491, 45 Pac. 406; *Lafayette, etc., R. Co. v. Adams*, 26 Ind. 76.

The rule as to trespassers on street cars is: "A street railroad company owes a trespasser no duty of protection. Its servants have the right to remove him from the car, but in so doing they are required to subject him to no unnecessary hazard. They have no right to seize him and throw him from the car while it is in motion, or to so violently assault or frighten him as to cause him to fall from the car. In order to justify a recovery, however, the acts of the defendant's servants must have been improper, unnecessarily dangerous, the proximate cause of the injury, and done for the purpose of removing the plaintiff from the car." *Nellis Street Railroad Accident Law*, p. 141, citing *Ansteth v. Buffalo Ry. Co.*, 145 N. Y. 210, 39 N. E. 708.

he was bound to show due care which was concurrent with this act and immediately subsequent to it. This brings us to a consideration of the rules and principles applicable to this kind of liability. It is familiar law that, in the absence of a statutory provision, mere negligence, whatever its degree, if it does not include culpability different in kind from that of ordinary negligence, does not create a liability in favor of one injured by it, if his own negligence contributes to his injury. It is equally true that one who willfully and wantonly, in reckless disregard of the rights of others, by a positive act or careless omission exposes another to death or grave bodily injury, is liable for the consequences, even if the other was guilty of negligence or other fault in connection with the causes which led to the injury. The difference in rules applicable to the two classes of cases results from the difference in the nature of the conduct of the wrongdoers in the two kinds of cases. In the first case the wrongdoer is guilty of nothing worse than carelessness. In the last he is guilty of a willful, intentional wrong. His conduct is criminal or *quasi-criminal*. If it results in the death of the injured person, he is guilty of manslaughter. *Commonwealth v. Pierce*, 138 Mass. 165, 52 Am. Rep. 264; *Commonwealth v. Hartwell*, 128 Mass. 415, 35 Am. Rep. 391. The law is regardful of human life and personal safety, and, if one is grossly and wantonly reckless in exposing others to danger, it holds him to have intended the natural consequences of his act, and treats him as guilty of a willful and intentional wrong. It is no defense to a charge of manslaughter for the defendant to show that, while grossly reckless, he did not actually intend to cause the death of his victim. In these cases of personal injury there is a constructive intention as to the consequences, which, entering into the willful, intentional act, the law imputes to the offender, and in this way a charge which otherwise would be mere negligence becomes, by reason of a reckless disregard of probable consequences, a willful wrong. That this constructive intention to do an injury in such cases will be imputed in the absence of an actual intent to harm a particular person is recognized as an elementary principle in criminal law. It is also recognized in civil actions for recklessly and wantonly injuring others by carelessness. *Palmer v. Chicago, St. L. & P.*

R. Co., 112 Ind. 250, 14 N. E. 70; *Shumacher v. St. Louis & Santa Fé R. Co.* (C. C.), 39 Fed. 174; *Brannen v. Kokomo, G. & J. Gravel Road Co.*, 115 Ind. 115, 17 N. E. 202, 7 Am. St. Rep. 411. In an action to recover damages for an assault and battery it would be illogical and absurd to allow as a defense proof that the plaintiff did not use proper care to avert the blow. See *Sanford v. Eighth Avenue R. Co.*, 23 N. Y. 343-346, 80 Am. Dec. 286. It would be hardly less so to allow a similar defense where a different kind of injury was wantonly and recklessly inflicted. A reason for the rule is the fact that, if a willful, intentional wrong is shown to be the direct and proximate cause of an injury, it is hardly conceivable that any lack of care on the part of the injured person could so concur with the wrong as also to be a direct and proximate contributing cause to the injury. It might be a condition without which the injury could not be inflicted. See *Newcomb v. Boston Protective Department*, 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354. It might be a remote cause, but it hardly could be a cause acting directly and proximately with the intentional wrongful act of the offender. *Judson v. Great Northern Ry. Co.*, 63 Minn. 248-255, 65 N. W. 447. The offense supposed is different in kind from the plaintiff's lack of ordinary care. It is criminal or quasi-criminal. Not only is it difficult to conceive of a plaintiff's negligence as being another direct and proximate cause foreign to the first, yet acting directly with it, but it would be unjust to allow one to relieve himself from the direct consequences of a willful wrong by showing that a mere lack of due care in another contributed to the result. The reasons for the rule as to the plaintiff's care in actions for ordinary negligence are wanting, and at the same time the facts make the rule impossible of application. The general rule that the plaintiff's failure to exercise ordinary care for his safety is not a good defense to an action for wanton and willful injury caused by a reckless omission of duty, has been recognized in many decisions, as well as by writers of text-books. *Aiken v. Holyoke Street Ry. Co.*, 180 Mass. 8, 14, 15, 61 N. E. 557; *Wallace v. Merrimack River Navigation Express Co.*, 134 Mass. 95, 45 Am. Rep. 301; *Banks v. Highland Street Ry. Co.*, 136 Mass. 485, 486; *Palmer v. Chicago, St. L. & P. R Co.*, 112 Ind. 250, 14 N. E. 70; *Bran-*

nen v. Kokomo, G. & J. Gravel Road Co., 115 Ind. 115, 17 N. E. 202, 7 Am. St. Rep. 411; *Florida Southern Ry. Co. v. Hirst*, 30 Fla. 1, 11 So. 506, 16 L. R. A. 631, 32 Am. St. Rep. 17; *Shumacher v. St. Louis & Santa Fé R. Co.* (C. C.), 39 Fed. 174; 7 Am. & Eng. Encyc. of L. (2d ed.) 443, and note; Beach Cont. Neg. (3d ed.), §§ 46, 50, 64, 65; 2 Wood Railroads (2d ed.), 1452; 3 Elliott Railroads, § 1175; 1 Thomp. Neg., § 206; Cooley Torts (2d ed.), 810. We have been referred to no case in which it is held that it makes any difference whether the plaintiff's lack of ordinary care is only previous to the defendant's wrong, and continuing to the time of it, or whether there is such a lack after the wrong begins to take effect. It is difficult to see how there can be any difference in principle between the two cases. In this Commonwealth, as in most other jurisdictions, liability does not depend upon which of different causes contributing to an injury is latest in the time of its origin, but upon which is the direct, active efficient cause, as distinguished from a remote cause, in producing the result.

There are expressions in some of the cases which imply the possibility of contributory negligence on the part of the plaintiff in a case of a wanton and reckless injury by a defendant. If there is a conceivable case in which a plaintiff's want of due care may directly and proximately contribute as a cause of an injury inflicted directly and proximately by the willful wrong of another, such a want of care must be something different from the mere want of ordinary care to avoid an injury coming in a usual way. There is nothing to indicate the existence of peculiar conditions of this kind in the present case. Conduct of a plaintiff which would be negligence precluding recovery if the injury were caused by ordinary negligence of a defendant will not commonly preclude recovery if the injury is inflicted willfully through wanton carelessness. This is illustrated by the former decision in this case and by many others. *Aiken v. Holyoke Street Ry. Co.*, 180 Mass. 8, 61 N. E. 557; *McKeon v. New York, New Haven & Hartford R. Co.* (Mass.), 67 N. E. 329. As to this kind of liability of the defendant, it was certainly proper to instruct the jury that in reference to ordinary kinds of care to avoid an injury from a car the plaintiff need not show

that he was in the exercise of due care if a lack of such care would have no tendency to cause the willful and wanton injury. The fair interpretation of the instruction given is that it referred to ordinary kinds of care to avoid an injury from an electric car. On this branch of the case there seems to have been no reason for an instruction in regard to any special care, and probably neither counsel nor the court had any care in mind except that in reference to which, in any view of the law, the instruction was properly given. We are of opinion that the ruling excepted to was correct.

The instruction that a master is liable for the acts of his servant done recklessly or willfully in the course of his employment was correct. *Howe v. Newmarch*, 12 Allen, 49; *Young v. South Boston Ice Co.*, 150 Mass. 527, 23 N. E. 326; *Wallace v. Merrimack River Navigation & Express Co.*, 134 Mass. 96, 45 Am. Rep. 301; *Ramsden v. Boston & Albany R. Co.*, 104 Mass. 117, 6 Am. Rep. 200; *Mott v. Consumers' Ice Co.*, 73 N. Y. 543.

The evidence of previous acts of carelessness on the part of the plaintiff was rightly excluded. *Hatt v. Nay*, 144 Mass. 186, 10 N. E. 807.

Exceptions overruled.

Gleason v. Worcester Consolidated Street Railway Co.

(Massachusetts — Supreme Judicial Court, Worcester.)

COLLISION WITH PEDESTRIAN; CONTRIBUTORY NEGLIGENCE.—In an action for damages for the death of a person struck and killed by a street car, the plaintiff cannot recover without evidence sufficient to show that the intestate was in the exercise of ordinary care. If the inference from the evidence that he exercised ordinary care is only conjectural, the question ought not to be submitted to the jury.

Collisions with workmen on street.—See *Nellis Street Railroad Accident Law*, p. 324. Municipal or other employees engaged in work in the public streets on or near the tracks of street railway companies are entitled to such protection from injury by the operation of street cars as would ordinarily be provided by a careful and prudent management of such cars. The degree of care to be used will depend upon the circumstances, and will vary according to the character of the employment and the conditions under which the work is being done. For instance, in the case of *Bengvenga v. Brooklyn Heights R. Co.*, 48 App. Div. (N. Y.) 515, 62 N. Y. Supp. 912, it appeared that the

EXCEPTIONS by plaintiff from judgment for defendant. Decided October 21, 1903. Reported 184 Mass. 290, 68 N. E. 225.

H. L. Parker, Jr., for plaintiff.

Charles C. Milton and Chandler Bullock, for defendant.

Opinion by BARKER, J.

The action is for damages for causing the death of the plaintiff's intestate, who was struck and killed by one of the defendant's cars. As he was not a passenger, even if the defendant was

plaintiff, an employee of a corporation which, without interrupting the operation of the defendant's cars, was repairing a street upon which the defendant maintained its railroad, and was engaged in carrying hot asphalt upon a shovel from the side of the defendant's track and placing it between the rails thereof; that a passenger car having approached while the plaintiff was attempting to deposit a shovelful of asphalt, he waited until the car had passed, and then stepped upon the rails, when he was struck by a freight car, which followed the passenger car, and which had given no signal of its approach; it was held that the defendant was liable, and that the condition was one requiring the person operating the car to exercise extreme care for the protection of the workmen, and to give abundant warning of its approach, and to have it under such control that it could be stopped practically upon the instant. And in the case of *Lewis v. Binghamton R. Co.*, 35 App. Div. (N. Y.) 12, 54 N. Y. Supp. 452, it appeared that an employee of a contractor was engaged in taking tar in a bucket from a vat near by, where it was heated, and pouring it while hot into the cracks between the stones composing a street pavement adjacent to the rails of a street railroad; just as he stooped down to fill the cracks he looked and saw no car in sight within a distance of 1,500 feet; the nature of his employment required him to lean down to within about two feet from the track, in order to see that the tar entered the cracks and did not overflow; he did not look again after stooping, and while engaged in filling the cracks he was struck by a car which gave no notice or signal of its approach. It was held that a question was presented for the jury as to whether or not under the circumstances the plaintiff was negligent in not keeping a better lookout for the car.

Contributory negligence of workman.—A workman engaged in his labors upon a street in close proximity to a street railroad where a collision is likely to occur should exercise ordinary care to note the approach of cars and to get out of the way in time to avoid danger. *McKeown v. Cincinnati St. R. Co.*, 2 Ohio Leg. News, 388; *Ferguson v. Philadelphia Traction Co.*, 9 Pa. Co. Ct. 147. In the case of *Eddy v. Cedar Rapids & M. C. Ry. Co.*, 98 Iowa, 626, 67 N. W. 676, the plaintiff was employed by a city as a street crossing repairer; he was engaged at a street crossing upon a street where street cars

guilty of negligence, or the defendant's servants were guilty of gross negligence in causing the death, the plaintiff cannot recover without affirmative evidence sufficient to justify a finding that her intestate was in the exercise of ordinary care. If from the evidence the inference that he exercised ordinary care can be only

frequently passed in leveling a crossing; for this purpose he was using a plank, one end of which extended so close to the street car track as to come in contact with passing cars; while standing with his back toward an approaching car he leaned over the end of the plank near the track to see whether the sleepers were level. An approaching car struck the plank and threw it against his ankle, injuring it. He did not know of the approach of the car until it was close to him, although his hearing was not defective. It was held that he was guilty of contributory negligence. See also *Nolan v. Metropolitan St. Ry. Co.*, 65 App. Div. (N. Y.) 184, 72 N. Y. Supp. 501; *Miller v. Grieme*, 53 App. Div. (N. Y.) 276, 65 N. Y. Supp. 813.

Signal to warn workman of approach of car.—While street car employees have a right to assume that a workman will exercise ordinary care to get out of the way of an approaching car, they are not free from negligence if they run their cars so that they cannot be readily stopped or if they fail to give ample warning of their approach when a signal is reasonable and prudent under the circumstances. *Pittsburgh Elec. R. Co. v. Kelly*, 57 Kan. 514, 46 Pac. 945; *Owens v. People's Pass. R. Co.*, 155 Pa. St. 334, 26 Atl. 748. The motorman of an electric car is not, however, chargeable with negligence in failing to give a signal of its approach to a laborer on the street who was not so near to the track as to be in danger of being struck by the car. *Eddy v. Cedar Rapids, etc., R. Co.*, 98 Iowa 626, 67 N. W. 676.

Injury to street cleaners.—A street sweeper in the employ of a city, at work upon a public street between the rails of a street surface railroad, is not bound to exercise the same degree of care with respect to street cars as would be required of ordinary pedestrians. *O'Connor v. Union Ry. Co.*, 67 App. Div. (N. Y.) 99, 73 N. Y. Supp. 606; *Dipalo v. Third Ave. R. Co.*, 55 App. Div. (N. Y.) 566. In the case first cited it was held, however, that street sweepers are required to use reasonable care to avoid being run over, and that where it appeared that he from time to time at intervals of a minute or so looked for the approach of cars upon the track on which he was working, and that he was doing his work in the usual and proper way, was sufficient to warrant a finding that he exercised such care as was required of him under the circumstances. In the case of *Daly v. Detroit Citizens' St. Ry. Co.*, 105 Mich. 193, 63 N. W. 73, the plaintiff was employed by a city in sweeping a street crossing over which several street car lines passed, and with which he was familiar; in getting out of the way of a north-bound car he stepped between the tracks and was struck by a car on the other track; his back was turned toward the approaching car and he was not aware of its approach until warned by a policeman; it was held that he was guilty of contributory negligence.

conjectural, the question ought not to be submitted to a jury. *Creamer v. West End Street Ry. Co.*, 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456; *Mathes v. Lowell, etc., Street Ry. Co.*, 177 Mass. 416, 59 N. E. 77; *Cox v. South Shore Street Ry. Co.*, 182 Mass. 497, 499, 65 N. E. 823, and cases cited. The plaintiff's intestate was employed in operating a stationary engine and air compressor, used in constructing a sewer in the street. The sewer trench was parallel with the defendant's tracks, and between them and the sidewalk, and the sides of the trench were sustained by sheathing, which came above the surface of the street. The edge of the trench was about two feet from the nearest track. The engine and compressor were at the northerly end of the trench, and the place where the plaintiff's intestate stood when operating them was about two feet from the nearest rail of the nearest track. Northerly of the boiler of the apparatus was a shield of boards, two or three feet square, to catch any oil flying from the compressor, and this shield was nearly parallel with the track, and about eighteen inches from the rail, and between the edge of the shield and the boiler was just room for passage. The plaintiff's intestate could not reach the other side of the compressor nearest the sidewalk except by going out on to the street, and going round the end of the compressor. The occupation of the plaintiff's intestate confined him substantially to a single spot, in which he stood with his face toward the north, toward the pressure tank, and it was necessary for him to have his hand on the throttle a good share of the time, in order to control his engine. It was sometimes necessary to oil certain parts of the apparatus, but he was not engaged in oiling anything at the time, and there was nothing shown that would call him away from his engine, and no evidence that anything about his work required him to go between the rails of the track. Just before the accident he had gone around the boiler, and had some talk with the fireman, after which they both turned to their work. While they were talking, the plaintiff's intestate was looking southerly down the track toward the car which afterward struck him, and which the fireman testified that he (the fireman) saw about 300 feet away as he turned to his work. The fireman had just turned to his work, and had only time to turn a valve, when the car flew by, and struck the plain-

tiff's intestate, who had stepped out upon the track at a point just opposite the wooden shield. The car knocked him down, and carried his body under the wheels and fender sixty feet up the track, which was upon an up grade of 5 per cent. There was conflicting evidence as to the rate of speed, and the evidence would have justified a finding that the rate was anywhere from four to fifteen miles an hour. The plaintiff's intestate was unconscious until his death. Besides the testimony of the fireman, there was that of the motorman of the car, and also that of a traveler on the street, who testified that he was driving northerly, and that the plaintiff's intestate was standing beside his engine, and then, when the car was eight or ten feet away, stepped out upon the track, and turned north, and that he had just stepped upon the track when the car was upon him, and that he turned half round to the right, and put his hand up in front of the car. The motorman testified that he saw a man step onto the track from behind the engine about eight feet in front of the car. The fireman testified that the car was going eight or nine miles an hour, the motorman that it was going four or five miles an hour, and that he was ringing his gong all the time, and that at once, as soon as he saw the man, he shut off the power, turned on the whole reverse power, and put on the full force of the emergency air brake. The traveler testified that the car was going fifteen miles an hour, and that he heard the gong when the car was at Kendall street, 300 feet away. Twenty minutes after the accident, the fireman found the throttle of the compressor wide open, although he never knew the plaintiff's intestate to leave his work unless he shut down his engine before. To step from a place of safety, only two feet away, upon the track of an electric street railway, directly in front of, and only eight or ten feet from, an approaching electric car, whether the car is approaching at the rate of four or five, or eight or nine miles, or fifteen miles an hour, is not evidence of care on the part of the person who does the act. It may or may not be consistent with ordinary care. If the person who does it is struck by the car and killed, no recovery can be had for his death without affirmative proof that he was exercising care to avoid being hit. Assuming from the fact that the plaintiff's intestate left his engine without shutting it down, that he had occasion to pass in the street around

the shield to the other end of the compressor, he knew that a car might at any time come up the street behind him, and that if he placed himself within the space it would cover he might be hit unless he got out of the way. If we also assume, as the plaintiff contends could be inferred fairly, that he had just seen the approaching car as he was looking toward it while talking with the fireman, he had had actual knowledge that a car was then approaching. His conduct in stepping onto the track within eight or ten feet of the car is as consistent with the theory that he had not seen the car, and went upon the track without taking any care to avoid being hit, or that he had forgotten that it was approaching, and so took no care or precaution, as with the theory that he had the danger in mind, and thought that he had time to enter upon the track and still get out of the way of the car. Either inference is purely conjectural. In our opinion the verdict for defendant was ordered rightly, because there was no sufficient or affirmative evidence that the plaintiff's intestate exercised care. See *Kelley v. Wakefield, etc., Street Ry.*, 175 Mass. 331, 56 N. E. 285; *Hurley v. West End Street Ry. Co.*, 180 Mass. 370, 62 N. E. 263. This view makes it immaterial whether the evidence offered by the plaintiff and excluded, to show negligence on the part of the defendant, was excluded rightly.

Exceptions overruled.

Mellen v. Old Colony Street Railway Co.

(Massachusetts — Supreme Judicial Court, Bristol.)

INJURY TO CHILD BY COLLISION.—The question as to whether the father of a child, injured by a collision with one of the defendant's cars, exercised due care in letting such child play in an inclosed yard, and whether such child was under the charge of her older sister after they left the yard and went upon the street where the accident occurred, is for the jury.

As to negligence of parents imputed to child precluding recovery, see note on "Imputed Negligence," *ante*, p. 391.

EXCEPTIONS by defendant from judgment for plaintiff. Decided November 25, 1903. Reported 184 Mass. 399, 68 N. E. 679.

J. W. & Chas. R. Cummings, for plaintiff.

J. M. Swift, for defendant.

Opinion by LORING, J.

This is a case in which the father of a family of six children allowed the plaintiff, a child of three years and three months, to go into the yard to play with her older sister, aged nine years and nine months, and with the daughter of a neighbor, aged ten. The father lived in a tenement to which was attached a large, roomy yard, shut in by a gate, which was kept closed by a strong spring. On the day in question he was at home, tapping the shoes of one of the children, and his wife was nursing the baby. After going into the yard to play, the children wandered off into the street, and the plaintiff was run over by a car of the defendant while she was crossing Bedford street on her way home. The defendant asked the presiding judge to order a verdict for it "on the ground that there was not sufficient evidence to go to the jury of due care on the part of Katie Mellen, the person who defendant claims had the plaintiff in charge at the time of the accident." This was refused. The case was submitted to the jury under suitable instructions, to which no exception was taken, and which are not set forth in the bill of exceptions.

We are of opinion that it was at least a question for the jury whether, in the first place, the father exercised due care in letting the plaintiff play in the yard, and whether, in the second place, the plaintiff was under the charge of her older sister after they left the yard and went upon the street. On the first question there can be no doubt. In this case the yard was closed by a gate, and in that respect differs from *Cotter v. Lynn & Boston R. Co.*, 180 Mass. 145, 61 N. E. 818, 91 Am. St. Rep. 267, and comes within *Powers v. Quincy & Boston Street Ry. Co.*, 163 Mass. 5, 39 N. E. 345. In addition, the plaintiff was put under the charge of her older sister while playing in the yard, and so the case is within cases like *Mulligan v. Curtis*, 100 Mass. 512, 97 Am. Dec. 121, and *Collins v. South Boston R. Co.*, 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675. The father testified that when the neighbor's

daughter came in and asked the older sister to go and play, he said, "You take Essie [the plaintiff] with you," "and go right in the yard and play." When the three children left the yard, it was at least a question for the jury whether the plaintiff continued to be under the charge of her older sister, or was in the position of a child who has got out on the street without fault on the part of its parents, and whose rights depend upon the exercise by it of that care which may reasonably be expected from children of its age; as in *Slattery v. O'Connell*, 153 Mass. 94, 26 N. E. 430, 10 L. R. A. 653; *Butler v. New York, New Haven & Hartford R. Co.*, 177 Mass. 191, 58 N. E. 592; *O'Brien v. Hudner*, 182 Mass. 381, 65 N. E. 788. Whether the plaintiff continued to be under the charge of her sister when the children left the yard depends upon this: Did the father put the plaintiff under the charge of the older sister for the afternoon, with an injunction to stay in the yard, or was she allowed to play in the yard under the charge of the older sister? It was at least a question for the jury, which was the true nature of the permission that the father gave. If the plaintiff's rights depended on the exercise by her of the care which may reasonably be expected from a child of her age, there was evidence for the jury that the plaintiff exercised due care. For these reasons we are of opinion that the plaintiff had a right to go to the jury on this ground, and for that reason the ruling requested was rightly refused.

Exceptions overruled.

Dalton v. New York, New Haven & Hartford Railroad Co.

(Massachusetts — Supreme Judicial Court, Hampden.)

1. **CONFLICTING EVIDENCE AS TO SOUNDING GONG.**—Where the evidence as to whether the whistle and gong on an electric car were sounded as required by law was conflicting a question of fact is raised for the jury to determine.

As to liability of street railway company for failure of motorman to sound whistle or gong, see *Warner v. St. Louis & M. R. Co.*, 2 St. Ry. Rep. 520, 178 Mo. 125, 77 S. W. 67; *Lynch v. Third Ave. R. Co.*, 2 St. Rep. 785, 88 App. Div. (N. Y.) 604, 85 N. Y. Supp. 180; *Union Traction Co. v. Vandercook*, 2 St. Ry. Rep. 231, (Ind. App.) 69 N. E. 486; *Buren v. St. Louis Transit Co.*, 2 St. Ry. Rep. 616 (Mo. App.) 78 S. W. 680.

2. EVIDENCE AS TO EXERCISE OF DUE CARE IN APPROACHING A CROSSING.—

Where the plaintiff's evidence, showing that before crossing an electric railway track he stopped and looked and listened for signals, and that at the time the smoke from an engine on a steam railroad track running parallel with the electric railway track obstructed the view, and that seeing no car approaching he crossed the track, and was struck by an electric car and injured, is sufficient to present the question as to whether the plaintiff was guilty of contributory negligence in attempting to cross the track.

EXCEPTIONS by defendant from verdicts for plaintiffs. Decided November 25, 1903. Reported 184 Mass. 344, 68 N. E. 830.

J. B. Carroll and W. H. McClintock, for plaintiffs.

Walter S. Robinson, for defendant.

Opinion by HAMMOND, J.

The defendant's theory of this accident is that the whistle and gong of the electric car were sounded as required by law; that at a time when the view of the third-rail track was obstructed by the freight train and by the smoke from the engine, so that the plaintiffs could not see whether or not an electric car was approaching, and while the noise of the train was so great as to lessen very much the chances of hearing the sound of the signals, the plaintiffs, without waiting for these temporary hindrances to sight and hearing to disappear, and, indeed, without looking or listening, entered upon the crossing and attempted to pass over it immediately after the caboose of the train had cleared the highway. It must be said that there was much evidence, direct and indirect, to support this theory, and it might reasonably have been expected that the jury would adopt it. Upon such a theory a verdict for the defendant would have been the necessary result. But it must also be said that, if the evidence for the plaintiffs was believed, the jury were warranted in rejecting this theory. The crossing was in the State of Connecticut, and, in accordance with the law of that State, the jury were instructed, in substance, that the defendant could not be found negligent if the whistle and gong of the electric car were sounded as required by the statutes of that State. Upon the question whether they were so sounded, the evidence, as is quite usual in cases of this nature, was conflicting, witnesses called by the defendant positively testifying that the signals were

given, and witnesses called by the plaintiffs testifying that they listened for the sounds, and did not hear them. The evidence on this question need not be rehearsed in detail. It is plain that under our decisions it raised a question of fact for the jury. In this respect the case is clearly distinguishable from cases like *Tully v. Fitchburg R. Co.*, 134 Mass. 499, and *Hubbard v. Boston & Albany R. Co.*, 159 Mass. 323, 34 N. E. 459, and must be classed with those like *Menard v. Boston & Maine R. Co.*, 150 Mass. 386, 23 N. E. 214, and *Davis v. New York, New Haven & Hartford R. Co.*, 159 Mass. 532, 34 N. E. 1070. If the signals were not given, then the defendants might have been found negligent, and upon the whole evidence the jury might have concluded that this negligence was contributory to the accident.

The more difficult question is whether the evidence was sufficient to warrant the finding that the plaintiffs were in the exercise of due care. Many of the facts are not in dispute. The four plaintiffs were in an open "canopy top wagon," which, with the single horse attached, had been hired at a livery-stable by Slaney for that ride; and he was driving. There were two tracks at the crossing; the southerly being used only for the cars propelled by steam, and the northerly, called the "third-rail track," being used only for the electric cars. A little after 9 o'clock in the summer evening the plaintiffs were in the vicinity of this crossing; and as they were approaching it from the south, and were opposite the house of one Davitt, which was about 250 feet from it, they observed a west-bound freight train approaching it from the east. After the train had passed over, Slaney drove to the crossing, and as he reached the northerly track his team was struck and overturned by an electric car which came from the west at a speed of about twenty-five miles an hour. Going westerly from the crossing, the grade of the track ascends, and the engine, after passing the crossing, emitted considerable smoke, which settled upon the third-rail track, thus more or less obscuring the plaintiffs' view. Slaney was familiar with the crossing, and knew that an electric car was scheduled to reach it from the west shortly after 9 o'clock. He testified, however, that at the time he thought it was hardly time for the car to reach there. Both the highway and the railway tracks were above the surface of the adjacent ground, and to one

standing in the highway there were no permanent objects to obstruct the view of the tracks for a distance of several hundred feet either side of the crossing. The evidence introduced for the plaintiffs tended to show that they stopped opposite Davitt's house "two minutes or so;" that during that time the freight train was passing the crossing, and that they were looking up and down the track and listening for signals; that at that time the engine was puffing and emitting considerable smoke; that before the train had entirely passed the crossing they started and drove to within fifty feet of it, looking during the time, and listening for signals from the electric car; that they then stopped "probably a minute and a half or two minutes," and again looked and listened for the signals; that while stopping there the caboose passed the crossing, and immediately the horse, which had become somewhat restless, started of its own accord for the crossing; that Slaney stopped the horse when its head was possibly over the first rail of the southerly track; that while there the plaintiff looked down the track toward the west; that the smoke from the engine "settled right down on the third-rail track" up to within fifty feet of the crossing; that while there they listened for signals from the electric car, but could hear none, and then, believing the track to be clear, they started to cross, and just as the horse reached the northerly track the light of the electric car "came right out of the cloud," three sharp whistles instantly sounded, and the team was struck. The evidence introduced by the plaintiffs tended further to show that the night was dark and cloudy; that while the plaintiffs were stopping at the southerly track the freight train had passed so far that the view of the third-rail track was no longer obstructed by that train, but only by the smoke and the darkness, that there was but little, if any, wind; that upon getting to the southerly track the plaintiffs were for the first time aware of the serious interruption to the view caused by the smoke; and that while stopping there they had reason to think that it would not quickly disappear. In this position, with a horse which already had manifested some symptoms of uneasiness which might lead to some apprehension as to what it might do, the plaintiffs, according to their own testimony, looked as well as they could and listened, and, hearing no whistle or gong, thought that there was no electric car, and that

it was better to cross than to wait for the lagging smoke to rise. Under all the circumstances of the case, the question whether the plaintiffs were in the exercise of due care in approaching the crossing and in attempting to cross it without waiting for the smoke to disappear was for the jury. The case must stand with cases like *Randall v. Connecticut River R. Co.*, 132 Mass. 269, and not with those like *Debbins v. Old Colony R. Co.*, 154 Mass. 402, 28 N. E. 274. We see no error in the way the court dealt with the requests for instruction.

Exceptions overruled.

Williams v. Citizens' Electric Street Railway Co.

(Massachusetts — Supreme Judicial Court, Essex.)

1. **DEFECTIVE DEVICE FOR OPENING AND SHUTTING DOOR; INJURY TO PASSENGER.**—The plaintiff's intestate was killed by falling from the rear platform of one of the defendant's street cars. It was alleged that the patented device for opening and shutting the sliding door of the vestibule was unsafe, causing an injury to the finger of the intestate, from the shock of which he fainted, and fell from the car. In the absence of proof that the plaintiff's intestate hurt his finger because of the defective device, and that the injury to the finger caused him to faint, it was held that the jury would not have been warranted in finding that the intestate's fall was caused by such injury.
2. **INSPECTION OF CAR BY JURY.**—There can be no presumption in favor of the plaintiff from an inspection of the car by the jury. Such inspection did not add anything to the evidence.

EXCEPTIONS by plaintiff from judgment in favor of defendant. Decided November 25, 1903. Reported 184 Mass. 437, 68 N. E. 840.

Alden P. White, for plaintiff.

Walter I. Badger, *Wm. Harold Hitchcock*, and *Chester F. Williams*, for defendant.

Opinion by KNOWLTON, C. J.

On the morning of November 4, 1900, about half an hour after midnight, the plaintiff's intestate, while riding on the rear plat-

Safe appliances.—It is the duty of a street railroad company as a carrier to carry a passenger safely to his destination, and to that end to provide suitable cars, machinery, means, and appliances, and see that they are kept

form of one of the defendant's cars, fell off and was killed. The theory of the plaintiff is that the patented device for opening and shutting the sliding door of the vestibule of the car was improper and unsafe, because in opening the door from the outside one must insert his fingers into a metallic slot sunk into the wood of the side of the door, near the main part of the car, with which the door came in contact when it was closed, and that when the door was opened it slid in such a way that the outer edges of the metallic slot, being sharp and rectangular, came into close proximity with the inner corner of the door post toward which the door slid, the door sliding from the main part of the car into the grooved end of the vestibule; that the plaintiff, who had previously injured the third finger of his left hand, so that it was then sensitive and tender, injured this finger again, by reason of the improper device, while opening the door; and that some time afterward, while riding in the vestibule, he fainted because of the condition of his finger, and fell off.

It is a grave question whether the bill of exceptions shows any evidence which would warrant the jury in finding the device for opening and shutting the door to be improper, so that the use of it by the defendant would constitute negligence. We cannot assume in favor of the excepting party that the inspection of the car by the jury added anything to the evidence stated in the bill of exceptions. But if it were found that the metallic slot exposed those who opened the door to the risk of getting their fingers bruised against the corner of the door post when the door was slid back as far as possible, there is no proof in this case that the plaintiff's intestate hurt his finger in this way. We have testimony of his declaration that he jammed his finger in the door, but he said nothing as to how he happened to jam it. The testimony of the only witness who saw him open the door tends to show that he used his right hand in sliding the door open, and there is no testimony that

properly in repair. It is not required to provide its cars with "all known and approved machinery necessary to protect its passengers from injury," but it is sufficient if it has all approved appliances that are in general use, and which are necessary for the safety of passengers. *Nellis Street Railroad Accident Law*, p. 62. As to injury to passenger by defective gate on platform of car, see *Aston v. St. Louis Transit Co.*, 2 St. Ry. Rep. 631, (Mo. App.) 79 S. W. 999.

the fingers of his left hand came in contact with the sunken metallic slot complained of. There is nothing better than conjecture on which to rest this part of the plaintiff's case.

Proof is also wanting to support the contention that the injury to the finger was the cause of his falling from the car. There is a possibility that pain in his finger caused him to faint, but there is no evidence that tends to show that he fell from this cause, to the exclusion of other causes. He might have fallen from weariness or sleepiness, or from some effect of six or eight glasses of ale which the testimony shows that he had drunk that evening, or from apoplexy, or from his own carelessness. There is nothing to show that he fainted, and, if he did faint, it is not shown that the faintness was caused by an injury to his finger. The jury would not have been warranted in finding that his fall was caused by the injury to his finger. Possibly it was, but other theories and conjectures are quite as probable.

It is not contended that there was evidence of any other negligence on the part of the defendant, and, in the view we have taken, there is no occasion to consider whether the jury might have found that the plaintiff was in the exercise of due care.

The question as to whether a witness observed any difficulty in starting the door open from the outside in this car, or one like it, was incompetent. There is nothing to show that the injury to the intestate's finger on his left hand was caused by any difficulty in starting the door open. Moreover, the door of another car like this might stick and open with difficulty, when the door of this car might move freely.

Exceptions overruled.

Stevens v. Boston Elevated Railway Co.

(Massachusetts — Supreme Judicial Court, Suffolk.)

1. PRECAUTIONS FOR SAFETY AFTER ACCIDENT; EVIDENCE.¹—The adoption of additional precautions for safety by a defendant elevated railway company after an accident cannot be proved as tending to show liability for the method used at the time of the accident.

1. Evidence as to conditions existing after accident.—If it is shown that the condition of the place where the accident occurred has not been changed, evidence is admissible as to the condition of such place at a time subsequent

2. EVIDENCE AS TO VIOLATION OF RULES.—The violation of rules previously adopted by the company in reference to the safety of third persons is admissible in evidence as tending to show the negligence of the defendant's motorman for which the defendant is liable.

EXCEPTIONS by defendant from judgment in favor of plaintiff. Decided January 5, 1904. Reported 184 Mass. 476, 69 N. E. 338.

Whipple, Sears & Ogden, and Alexander Lincoln, for plaintiff.

W. G. Thompson, for defendant.

Opinion by KNOWLTON, C. J.

The only exception now relied on by the defendant is to the admission in evidence of the defendant's rule in regard to sounding the gong, in connection with testimony that the defendant's motor-

to the accident. *Jacksonville, etc., Ry. Co. v. Southworth*, 135 Ill. 250, 25 N. E. 1093; *Nesbit v. Town of Garner*, 75 Iowa, 314, 39 N. W. 516, 9 Am. St. Rep. 486, 1 L. R. A. 152; *Tromblay v. Harnden*, 162 Mass. 383, 38 N. E. 972; *Byrne v. Brooklyn City, etc., R. Co.*, 6 Misc. Rep. (N. Y.) 260, 26 N. Y. Supp. 760, affirmed, 145 N. Y. 619, 40 N. E. 163; *Stodder v. N. Y., L. E. & W. R. Co.*, 50 Hun (N. Y.) 221, affirmed, 121 N. Y. 655, 24 N. E. 1092; *Houston, etc., Ry. Co. v. Waller*, 56 Tex. 331; *Larson v. City of Eau Claire*, 92 Wis. 86, 65 N. W. 731; *Salladay v. Town of Dodgeville*, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541. If changes have been made in the condition of the place where the accident occurred subsequent thereto evidence thereof is admissible only for the purpose of showing the condition existing at the time of the accident. *Scagel v. Chicago, etc., Ry. Co.*, 83 Iowa, 380, 49 N. W. 990; *Kuhns v. Wisconsin, etc., Ry. Co.*, 76 Iowa, 67, 40 N. W. 92; *Atchison, etc., R. Co. v. McKee*, 37 Kan. 592, 15 Pac. 484; *Stone v. Town of Poland*, 81 Hun (N. Y.), 132, 30 N. Y. Supp. 748; *St. Louis, etc., Ry. Co. v. Johnston*, 78 Tex. 536, 15 S. W. 104.

In the case of *Birmingham Union Ry. Co. v. Alexander*, 93 Ala. 133, 9 So. 525, the plaintiff was injured by defects in a structure belonging to the defendant street railway, and it was held that evidence of the condition of the structure from one to five months after the accident occurred is admissible, where there is further evidence that there had been no change in its condition since the time of the accident.

It has been held that evidence may be admitted showing the condition of the place where the accident occurred immediately after the accident, if it does not appear that a change was made in such condition in the interval. *Wabash R. Co. v. Kime*, 42 Ill. App. 272; *Miller v. Northern Pacific R. Co.*, 36 Minn. 296, 30 N. W. 892; *Ahern v. Steele*, 48 Hun (N. Y.), 517, 1 N. Y. Supp. 259.

man disobeyed the rule, and that this disobedience was one of the causes of the accident. The decisions in different jurisdictions are not entirely harmonious upon the question now raised, but we are of opinion that the weight of authority and of reason tends to support the ruling of the judge in the present case.

It has been settled by various adjudications in this Commonwealth that the adoption of additional precautions for safety by a defendant, after an accident, cannot be proved, as tending to show liability for the method used at the time of the accident. *Menard v. Boston & Maine R. Co.*, 150 Mass. 386, 23 N. E. 214; *Shinners v. Proprietors, etc.*, 154 Mass. 168, 28 N. E. 10, 12 L. R. A. 554, 26 Am. St. Rep. 226; *Downey v. Sawyer*, 157 Mass. 418, 32 N. E. 654; *Hewitt v. Taunton Street Ry. Co.*, 167 Mass. 483, 485, 486, 46 N. E. 106; *Dacey v. New York, New Haven & Hartford R.*

For instance, evidence is admissible showing the condition of a structure or of the place where the accident occurred on the morning following the night of the accident. *Fuller v. City of Jackson*, 92 Mich. 197, 52 Mo. 1075; *Clapper v. Town of Waterford*, 62 Hun (N. Y.), 170, 16 N. Y. Supp. 640.

In the case of *Schmidt v. Coney Island & B. R. Co.*, 26 App. Div. (N. Y.) 391, 49 N. Y. Supp. 777, it was held that evidence as to the question of the vertical and lateral oscillation of an electric car at the point where the accident occurred and about a month thereafter, is inadmissible for the purpose of showing the extent of the oscillations at the time of the accident, where it does not appear that the conditions were similar.

Evidence as to subsequent precautions.—There seems to be some doubt as to the rule to be applied in respect to evidence tending to show that subsequent to the accident the defendant took precautionary measures to prevent the occurrence of similar accidents. The weight of authority seems to sustain the doctrine that such evidence is inadmissible for the purpose of showing that the condition existing at the time of the accident was unsafe, and that the defendant was guilty of negligence in maintaining such place in an unsafe condition. Among the many authorities which may be cited in support of this doctrine are: *Louisville & N. R. Co. v. Malone*, 109 Ala. 509, 20 So. 33; *Sappenfield v. Main St., etc., R. Co.*, 91 Cal. 48, 27 Pac. 590; *Terre Haute, etc., R. Co. v. Clem*, 123 Ind. 15, 23 N. E. 965, 18 Am. St. Rep. 303, 7 L. R. A. 588; *McGuerty v. Hale*, 161 Mass. 51, 36 N. E. 682; *Shinners v. Proprietors of Locks and Canals*, 154 Mass. 168, 28 N. E. 10, 26 Am. Rep. 226, 12 L. R. A. 554; *Thompson v. Toledo, etc., Ry. Co.*, 91 Mich. 255, 51 N. W. 995; *Morse v. Minneapolis, etc., Ry. Co.*, 30 Minn. 465, 16 N. W. 358 (in which case the question is discussed at length and all the leading authorities are cited); *Mahaney v. St. Louis & H. Ry. Co.*, 108 Mo. 191, 18

Co., 168 Mass. 479-481, 47 N. E. 418. This is the general rule in other jurisdictions. *Morse v. Minneapolis R. Co.*, 30 Minn. 465, 16 N. W. 358; *Columbia R. Co. v. Hawthorne*, 144 U. S. 202, 207, 208, 12 Sup. Ct. 591, 36 L. Ed. 405, and cases there cited.

On the other hand, the violation of rules previously adopted by a defendant in reference to the safety of third persons has generally been admitted in evidence as tending to show negligence of the defendant's disobedient servant for which the defendant is liable. The admissibility of such evidence has often been assumed by this court without discussion. *Mayo v. Boston & Maine R. Co.*, 104 Mass. 137-140; *Connolly v. New York & New England R. Co.*, 158 Mass. 8, 10, 11, 32 N. E. 937; *Floytrup v. Boston & Maine R. Co.*, 163 Mass. 152, 39 N. E. 797; *Sweetland v. Lynn & Boston R. Co.*, 177 Mass. 574, 578, 579, 59 N. E. 443, 51 L. R. A. 783. See also, in other courts, *Chicago, etc., R. Co. v. Lowell*, 151 U. S. 209-217, 14 Sup. Ct. 281, 38 L. Ed. 131; *Warner v. Baltimore & Ohio R. Co.*, 168 U. S. 339-346, 18 Sup.

S. W. 895; *Aldrich v. Concord & M. R. Co.*, 67 N. H. 250, 29 Atl. 408; *Corcoran v. Village of Peekskill*, 108 N. Y. 151, 15 N. E. 309; *Dale v. Delaware, L. & W. R. Co.*, 73 N. Y. 468; *Baird v. Daly*, 68 N. Y. 547; *Markowitz v. Dry Dock, etc., Co.*, 12 Misc. Rep. (N. Y.) 412, 33 N. Y. Supp. 702; *Lowe v. Elliott*, 109 N. C. 581, 14 S. E. 51; *Texas Trunk Co. v. Ayers*, 83 Tex. 268, 18 S. W. 684; *Jennings v. Town of Albion*, 90 Wis. 22, 62 N. W. 926; *Heucke v. Milwaukee City Ry. Co.*, 69 Wis. 401, 34 N. W. 243. See *contra*, *Savannah, etc., Ry. Co. v. Flannagan*, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183 (which was an action against a railway company for damages for personal injuries, and it was held that evidence was admissible to show that, after the accident, the engines of the company ran more slowly at the place of the accident than they did previously); *City of Olathe v. Mizee*, 48 Kan. 435, 29 Pac. 754, 30 Am. St. Rep. 308; *Link v. Philadelphia, etc., R. Co.*, 165 Pa. St. 75, 30 Atl. 820; *Lederman v. Pennsylvania R. Co.*, 165 Pa. St. 118, 30 Atl. 725, 44 Am. St. Rep. 644 (which case was an action against a railroad company for an injury caused by its negligence at a crossing, and evidence was held admissible to the effect that very soon after the accident the company erected gates at such crossing); *Jenkins v. Hooper, etc., Co.*, 13 Utah, 100, 44 Pac. 829.

To show that a particular act was negligent, evidence is not admissible to show that the defendant refrained from repeating the act after the injury complained of. *Anderson v. Chicago, etc., Ry. Co.*, 87 Wis. 195, 58 N. W. 79, 23 L. R. A. 203.

Ct. 68, 42 L. Ed. 491. In *Floytrup v. Boston & Maine R. Co.*, *ubi supra*, Mr. Justice Barker said in the opinion:

"The evidence of the usage of the road that one train should not enter a station while another train was engaged in delivering passengers there was competent upon the question whether the defendant's servants managed the train in a proper manner."

Similar statements of the law may be found in numerous cases. *Dublin, Wickford & Wexford Ry. Co. v. Slattery*, 3 App. Cas. 1155-1163; *Delaware, etc., R. Co. v. Ashley*, 67 Fed. 209-212, 14 C. C. A. 368; *Cincinnati Street Ry. Co. v. Altemeier*, 60 Ohio St. 10, 53 N. E. 300; *L. S. & M. S. Ry. Co. v. Ward*, 135 Ill. 511-518, 26 N. E. 520; *Georgia Ry. Co. v. Williams*, 74 Ga. 723-773; *Atlanta Cons. Ry. Co. v. Bates*, 103 Ga. 333, 30 S. E. 41. The only decision to the contrary of which we are aware is in the case of *Fonda v. Railway Co.*, 71 Minn. 438-449, 74 N. W. 166, 70 Am. St. Rep. 341.

It is contended by the defendant that there is no sound principle under which such evidence can be admitted. The evidence is somewhat analogous to proof of the violation of an ordinance or statute by the defendant or his servant which is always received as evidence, although not conclusive, of the defendant's negligence. *Wright v. Malden & Melrose Ry. Co.*, 4 Allen, 283; *Lane v. Atlantic Works*, 111 Mass. 136; *Hall v. Ripley*, 119 Mass. 135; *Hanlon v. South Boston, etc., Ry. Co.*, 129 Mass. 310. Such an ordinance or statute, enacted by a body representing the interests of the public, imposes *prima facie* upon everybody a duty of obedience. Disobedience is, therefore, a breach of duty, unless some excuse for it can be shown which creates a different duty, that, as between man and man, overrides the duty imposed by the statute or ordinance. Such disobedience in a matter affecting the plaintiff is always competent upon the question whether the defendant was negligent. So, a rule made by a corporation for the guidance of its servants in matters affecting the safety of others is made in the performance of a duty, by a party that is called upon to consider methods, and determine how its business shall be conducted. Such a rule, made known to its servants, creates a duty of obedience as between the master and the servant, and disobedience of it by the servant is negligence as between the two. If

such disobedience injuriously affects a third person, it is not to be assumed in favor of the master that the negligence was immaterial to the injured person, and that his rights were not affected by it. Rather ought it to be held an implication that there was a breach of duty toward him, as well as toward the master who prescribed the conduct that he thought necessary or desirable for protection in such cases. Against the proprietor of a business, the methods which he adopts for the protection of others are some evidence of what he thinks necessary or proper to insure their safety.

A distinction may well be made between precautions taken voluntarily before an accident, and precautions which are suggested and adopted after an accident. This distinction is pointed out in *Columbia R. Co. v. Hawthorne*, 144 U. S. 202-207, 208, 12 Sup. Ct. 591, 36 L. Ed. 405. Mr. Justice Gray, referring to changes made by a defendant after an accident, says in the opinion:

"It is now settled, upon much consideration, by the decisions of the highest courts of most of the States in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant has been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant."

In *Morse v. Minneapolis & St. Louis Ry. Co.*, 30 Minn. 465, 16 N. W. 358, it is said, referring to the same subject, that "a person may have exercised all the care which the law required, and yet in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards." See also *Illinois Central R. Co. v. Swisher*, 61 Ill. App. 611. In *Menard v. Boston & Maine R. Co.*, 150 Mass. 386, 23 N. E. 214, and in some of the earlier cases, there is language which goes further than the decision, and which might imply that such evidence as was received in this case is incompetent, but the case is authority only for that which was decided.

Exceptions overruled.

Spaulding v. Quincy & Boston Street Railway Co.

(Massachusetts — Supreme Judicial Court, Suffolk.)

INJURY TO PASSENGER ALIGHTING FROM CAR; FAILURE TO NOTIFY CONDUCTOR OF INTENTION.¹—The plaintiff was injured while alighting from one of the defendant's cars. It appeared that the car had reached the end of the line, and the trolley pole had been changed to the other end of the car, during which time the plaintiff indicated no intention of alighting; the car remained stationary for a sufficient length of time to enable all passengers to alight. As the car was about to start the plaintiff, without notifying the conductor of his intention, attempted to alight from the car, and in so doing he was thrown to the ground. It was held that the evidence was not sufficient to show negligence on the part of the defendant.

EXEMPTIONS by plaintiff from verdict for defendant. Decided January 5, 1904.
Reported 184 Mass. 470, 69 N. E. 217.

James E. Cotter and *Thomas F. McAnarney*, for plaintiff.

Henry F. Hurlburt and *Damon E. Hall*, for defendant.

Opinion by KNOWLTON, C. J.

On October 16, 1897, the plaintiff was traveling from Taunton to Boston by the street cars, on his way to Manchester, N. H., for

1. **Notice of intention to alight.**—It is contributory negligence for a passenger to attempt to alight from a car while it is in motion without the knowledge of the car employees that he desires to get off, and under such circumstances it is not negligence for the employees to increase the speed of the car. *Blakney v. Seattle Elec. Co.* (Wash.), 68 Pac. 1037. In the case of *Grabenstein v. Metropolitan St. Ry. Co.*, 84 N. Y. Supp. 261, where a passenger sought to recover for personal injuries received in alighting from a street car, alleged to have resulted from a premature start of the car, and there was no evidence that he had signaled the conductor or motorman to stop, or that either of them had notice of his intention to alight, or that the car had been started again with a knowledge on their part that he was in the act of alighting, it was held that the complaint should have been dismissed. See also *Lee v. Elizabeth, etc., Ry. Co.*, 1 St. Ry. Rep. 539, (N. J.) 55 Atl. 106.

It is the duty of the motorman to use reasonable care in listening for the usual signal to stop the car and give passengers an opportunity to alight,

which place he intended to take a train that would leave Boston at half-past 7 o'clock in the evening. Soon after he had passed Holbrook he inquired of the conductor whether the electric car would reach Boston in time to enable him to take that train, and was told that probably it would not, and that, to reach the train, it would be well for him to leave the electric car and take a steam car either at Braintree or Quincy. As the defendant's electric railway passes the station of the steam railroad in Braintree, there is a branch track leading from the main line, a distance of about 210 yards, to the station; and the car on which the plaintiff was riding left the main line and ran down this track to where the track terminated, and then ran back on the same track to the main line, and thence on to Quincy. After the car reached the terminus of the branch track at the station, some of the passengers alighted; the conductor carried the trolley around to the other end of the car, shutting off the lights in the car for a moment, and then put them on; other passengers got on the car; the car remained a sufficient time to enable any passengers who wished to alight or to get upon the car to do so easily; and the car then started back toward the main line. The plaintiff was sitting near the rear end of the car as it approached the station, and the forward end as it was about to go back. After seeing some of the passengers alight, and the conductor carry the trolley around from the rear of the car to the front, and after becoming aware that the car was about to go back, he started out through the door to the front platform, where the motorman then was, and stepped off the car. It was nearly 6 o'clock, but not very dark, although there were lights in the car

and, when signaled by a passenger to stop his car at a usual and customary station for stopping, a sufficient length of time to give him a reasonable opportunity to alight in safety, and his failure to perform this duty constitutes negligence. *Nellis Street Railroad Accident Law*, p. 109, and cases cited. See also *Fuller v. Denison & Sherman Ry. Co.*, 1 St. Ry. Rep. 780, and notes, (Tex.) 74 S. W. 940.

Notice to a conductor or gripman on a car, from the conduct of a passenger in his immediate presence and sight, that such passenger wished to alight as soon as the car came to a stop, is the equivalent of an express warning or notification by the passenger so as to render the company liable for the sudden starting of the car while he was endeavoring to alight. *West Chicago St. R. Co. v. Stiver*, 69 Ill. App. 625.

and near it outside. He testified that the car started suddenly just as he stepped upon the ground, and he fell, and his foot was crushed by the wheel of the car.

It is a grave question whether there was any evidence that he was in the exercise of due care. He had said nothing to the conductor or the motorman from the time when he made the inquiry in Holbrook. According to his testimony, he paid little attention to anything that was going on around him. He did nothing to obtain information in regard to the place where he was, or what were his surroundings; he gave no notice to any one of his desire or intention to alight; he was unable to give a clear account of how he stepped off; and he did not know whether there was a step on the car between the platform and the ground. It is not necessary to consider particularly the subject of the plaintiff's care, for we are of opinion that there was no evidence of negligence on the part of the defendant's servants. Although the plaintiff testified that the car started suddenly, there is nothing to indicate that the manner of starting it was unusual or dangerous. It is hardly possible to start a heavy electric car so quickly as to cause a jerk at the instant of its first movement, and, if it is possible, there is no evidence that it was done in this case. The plaintiff's fall seems to have been caused by his stepping to the ground while the car was moving, and not by its starting in any unusual way. Nor is there evidence that there was negligence in starting the car at that time. Neither the conductor nor the motorman had any reason to suppose that the plaintiff desired to get off. If the conductor saw him pass out of the door to the front platform, where the motorman was, that did not show that he was intending then to leave the car; and the motorman, so far as appears, knew nothing of his movement. The time had come for the car to start back toward the main line on its way to Quincy, and it was proper for those in charge of it to start it. In the absence of evidence that they knew or saw or ought to have seen anything that should have prevented them from starting the car at that time, the jury would not have been warranted in finding that they were negligent.

Exceptions overruled.

*Sears v. Crocker et al.; Merchants' National Bank v. Crocker;
Gray et al. v. Crocker.*

(Massachusetts — Supreme Judicial Court, Suffolk.)

SUBWAY AND TUNNEL IN STREET; ADDITIONAL SERVITUDE.¹—The use of city streets for the construction of a subway and tunnel for the accommodation of street traffic is not an additional servitude entitling the abutting owners to compensation, although it deprives such owners of the use of vaults and other similar underground structures in the streets which they had theretofore maintained.

BILLS in equity to obtain an injunction against Boston Transit Commission to prevent the construction of a certain subway and tunnel. Decided January 7, 1904. Reported 184 Mass. 586, 69 N. E. 327.

Lewis S. Dabney, Elihu G. Loomis, John C. Gray, Edw. W. Hutchins, and C. F. Choafe, Jr., for petitioners.

Thos. M. Babson, for respondents.

Opinion by KNOWLTON, C. J.

These three cases present the same questions, and they may be considered together in one opinion. They are bills in equity to obtain an injunction against the defendants, as members of the Boston Transit Commission, to prevent the construction of a subway and tunnel from Scollay square to East Boston, through public streets in front of the premises of the several plaintiffs, without a formal taking of land in the streets. The plaintiffs contend that the construction of the tunnel or subway without a formal taking of land in the streets is unauthorized and illegal, because it would impose an additional servitude upon lands previously taken for streets, and in that way would deprive the plaintiffs of property as owners of the fee in parts of these streets, and because Statutes 1894, page 771, chapter 548, section 31, provides for the taking of property "held under or by title derived under eminent domain or otherwise." They also say that their position is established and

1. As to whether a street surface railroad is an additional servitude upon the property of an abutting owner, see note appended to *Eustis v. Milton St. Ry. Co.*, 1 St. Ry. Rep. 311.

their contention confirmed by the provisions of Statutes 1902, page 457, chapter 534, section 19, that "the city shall have, hold and enjoy in its private capacity, for its own property, the existing subway, the East Boston tunnel, the Cambridge street subway, and the tunnel and subway built under this act," etc. The question whether the construction of the tunnel will create an additional servitude upon the plaintiffs' lands in the public streets lies at the foundation of these cases, and should be answered at the outset. The rules and principles applicable to such questions have often been considered by this court. *Attorney-General v. Metropolitan R. Co.*, 125 Mass. 515, 28 Am. Rep. 264; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Lincoln v. Commonwealth*, 164 Mass. 1, 41 N. E. 112; *Howe v. West End Street Ry. Co.*, 167 Mass. 46, 44 N. E. 386; *White v. Blanchard Bros. Co.*, 178 Mass. 363, 59 N. E. 1025; *New England Tel. & Tel. Co. v. Boston Terminal Co.*, 182 Mass. 397, 65 N. E. 835; *Eustis v. Milton Street Ry. Co.*, 183 Mass. 586, 67 N. E. 663. In the last two cases the doctrine was stated broadly, in accordance with previous decisions, that this public easement includes "every kind of travel and communication for the movement or transportation of persons or property, which is reasonable and proper in the use of a public street." In the early settlement of the country and in the location of streets in later times these ways were appropriated to the use of the public for the movement of persons and property from place to place, just as the adjacent lands were appropriated to the use of private owners. The original proprietors of lands in Boston and the original proprietors of lands in New York did not foresee the growth of population and business which has induced landowners to erect buildings fifteen or twenty stories high, and to excavate under them basements and cellars and subcellars to be ventilated by the use of engines, to be lighted by electricity, and filled with merchandise. They did not think that the surface of the streets would be insufficient for the use of the people with convenience and comfort in moving to and fro and passing in and out in the transaction of business or the pursuit of pleasure. It is now a fact of common knowledge that the streets of those parts of Boston which are most crowded are entirely inadequate to accommodate the public travel in a reasonably satisfactory way if

the surface alone is used. Our system, which leaves to the landowner the use of a street above or below or on the surface, so far as he can use it without interference with the rights of the public, is just and right, but the public rights in these lands are plainly paramount, and they include, as they ought to include, the power to appropriate the streets above or below the surface as well as upon it in any way that is not unreasonable, in reference either to the acts of all who have occasion to travel or to the effect upon the property of abutters. The increase of requirements for the public within the streets of our large cities has probably equaled, if it has not surpassed, the increase of requirements for business along the streets.

The Legislature, the guardian of public interests and of private rights, has determined that the space below the surface of certain streets in Boston is needed for travel. The question is whether action under the statutes involves an acquisition of a new right as against the landowner, or only an appropriation and regulation of existing rights. It hardly can be contended that this is an unreasonable mode of using the streets in reference either to travelers or abutters. If it is not an unreasonable mode of using them, the mere fact that it deprives abutters of the use of vaults and other similar underground structures in the streets, which they have heretofore maintained, is of little consequence. Abutters are bound to withdraw from occupation of streets above or below the surface whenever the public needs the occupied space for travel. The necessary requirements of the public for travel were all paid for when the land was taken, whatever they may be, and whether the particulars of them were foreseen or not. The only limitation upon them is that they shall be of a kind which is not unreasonable. In the present case the travel which is being provided for is from place to place within the city. There are stopping places on the subway at convenient points. In that respect it is different from a tunnel designed only or chiefly for travel for long distances. The new method is a substitution in part of a subterranean use of the streets for a use of their surface for the same general purpose. It is impracticable to have direct communication between the premises of abutters and the cars in the tunnel, but by going a short distance access to them may be had

from any place. We are of opinion that this use of the streets is within the purposes for which the lands were taken, and that no additional servitude is created by it.

The cases bearing upon this subject which have been decided in other courts differ so much from this in their facts and in the legislation to which they relate that they are not very important. See *Ramsden v. Manchester, South Junct. & Altingham Ry. Co.*, 1 Exch. 723; *In re New York Dist. Ry. Co.*, 107 N. Y. 42-52, 14 N. E. 187; *Hodgkinson v. Long Island R. Co.*, 4 Edw. Ch. 411; *Adams v. Saratoga & W. R. Co.*, 11 Barb. 414; *Chicago v. Rumsey*, 87 Ill. 348; *Summerfield v. Chicago* (Ill.), 64 N. E. 490-494; *Baltimore & Potomac R. Co. v. Reaney*, 42 Md. 117. The authority to take lands, conferred upon the defendants by Statutes 1894, page 771, chapter 548, section 31, although it includes land taken and held under the right of eminent domain, does not imply that there is no right to use the public ways without such taking. Indeed, the first part of the section gives the right to use these ways before it refers to the subject of taking. It then goes on to authorize the taking of private property, and closes by giving a broad general authority. Nor is Statutes 1902, page 457, chapter 534, section 19, so significant in their favor as the plaintiffs contend. It declares that "the city shall have, hold, and enjoy in its private or proprietary capacity for its own property" the several subways and the tunnel built and to be built under the statutes that have been passed. This is in accordance with the previous intimations of this court as to ownership of the subway first constructed. *Mahoney v. Boston*, 171 Mass. 427-429, 50 N. E. 939; *Browne v. Turner*, 176 Mass. 9-13, 56 N. E. 969. But it does not purport to give a private proprietary right to anything more than the subways and tunnels as structures. It does not deal with the rights of the public to use the streets, or with any right of private property in the streets themselves. It leaves the subways lawfully resting in the public streets by virtue of the rights of the public therein, and it gives the city the same kind of ownership of the structures that gas companies and electric lighting companies have in their pipes and conduits, except that the city is charged with certain special trusts in the ownership of these subways. This provision of the statute does not purport to

take from landowners on the streets any part of their property. The statute gives damages to all persons injured in their property by the acts of the commission, but the question whether these plaintiffs are entitled to damages under this provision is not before us.

Bills dismissed.

Albert v. Boston Elevated Railway Co.

(Massachusetts — Supreme Judicial Court, Suffolk.)

INJURY TO NEWSBOY JUMPING FROM CAR;¹ LIABILITY OF COMPANY.— A street railway company owes no duty to a newsboy who is a trespasser upon its cars, except to refrain from willfully, recklessly, and wantonly exposing him to injury.

EXCEPTIONS by plaintiff to judgment for defendant. Decided February 26, 1904. Reported (Mass.), 70 N. E. 52.

Charles W. Bartlett, Elbridge R. Anderson, and Robert Levi,
for plaintiff.

P. H. Cooney and L. F. Hyde, for defendant.

Opinion by KNOWLTON, C. J.

The plaintiff, a newsboy twelve years of age, jumped upon the running-board of an ordinary open street car as it was passing through Congress street, near State street, in Boston, for the purpose of selling his papers. He testified that he was in the habit of jumping on and off such cars when they were in motion. The testimony showed that the car was going at about its usual rate of speed, which we suppose was not great in that busy part of the city. There was no evidence that the speed was increased or

1. Other cases reported in this series relating to injuries to newsboys and children riding upon street cars without permission are: *Chicago City Ry. Co. v. O'Donnell*, 2 St. Ry. Rep. 147, (Ill.) 69 N. E. 882; *Aiken v. Holyoke St. Ry. Co.*, 2 St. Ry. Rep. 416, (Mass.) 68 N. E. 238; *Indianapolis St. Ry. Co. v. Hockett*, 1 St. Ry. Rep. 1159, (Ind.) 67 N. E. 106.

diminished after he attempted to get on until after the accident. As he was changing hands, and trying to get out a paper to deliver to a man who sat near the middle of the car, he fell off, or intentionally jumped off, and was injured. There was testimony that the conductor, who was standing on the rear platform, made a motion and said something which the plaintiff did not understand, but thought was, "Get out of here!" or "Get off!" and that the plaintiff, being frightened, jumped off. He was on the running-board but a very short time. To use his expression, "It all happened in a jiffy."

The plaintiff was a trespasser. His only right on the defendant's cars to sell newspapers at any time was under a contract between the defendant and his employer, in which it was stipulated that "newsboys shall enter and leave the cars by the rear platform, and while said cars are not in motion, and not otherwise." To him, as a trespasser, the defendant owed no duty except to refrain from willfully or recklessly and wantonly exposing him to injury. *Metcalfe v. Cunard Steamship Co.*, 147 Mass. 66, 16 N. E. 701; *Heinlein v. Boston & Providence R. Co.*, 147 Mass. 136, 16 N. E. 698, 9 Am. St. Rep. 676; *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369. In speaking to the plaintiff, the conductor was only trying to enforce the rule which the plaintiff was violating. He was not near the plaintiff, who was in the middle of the car. He had no reason to expect that his command would cause the plaintiff serious injury. There was no evidence that he acted wantonly or recklessly in telling the plaintiff to get off. The case is fully covered by *Mugford v. Boston & Maine R. Co.*, 173 Mass. 10, 52 N. E. 1078, and by *Bjornquist v. Boston & Albany R. Co.*, 70 N. E. 53. See also *Leonard v. Boston & Albany R. Co.*, 170 Mass. 318, 49 N. E. 621; *Planz v. Boston & Albany R. Co.*, 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835.

Exceptions overruled.

Keefe v. Lexington & Boston Street Railway Co.

(Massachusetts — Supreme Judicial Court, Middlesex).

AUTHORITY OF TOWN SELECTMEN TO LIMIT RATE OF FARE.¹— A statute authorizing the selectmen of a town to grant a location therein to a street railway and to impose such terms, conditions, and obligations as the public interest may in their judgment require (Stat. 1898, chap. 578, § 13), does not authorize such selectmen to limit the rate of fare to be charged, as a condition for the grant, in view of other statutes relating to rates of fare to be charged by street railway companies. The acceptance of a grant of location containing such a condition does not make it valid.

APPEAL by plaintiff from judgment for defendant. Decided February 26, 1904. Reported (Mass.), 70 N. E. 37.

Alexander Wilson, for appellant.

Coolidge & Hight, for appellee.

Opinion by KNOWLTON, C. J.

The plaintiff seeks to recover five cents, paid under protest for his fare, demanded by the conductor on one of the defendant's cars. The defendant corporation was organized under the laws of this Commonwealth after Statutes 1898, page 737, chapter 578, went into effect. The selectmen of the town of Concord and the selectment of the town of Bedford, in granting the defendant a location in their respective towns, prescribed conditions as to the

1. In the case of *Flood v. Leahy*, 1 St. Ry. Rep. 303, (Mass.) 66 N. E. 787, it was held that a town by the vote of its electors granting a franchise to a street railway could not limit the rate of fare to be charged by the company. But in the case of *Vining v. Detroit, Y. A. A. & J. Ry. Co.*, 1 St. Ry. Rep. 366, (Mich.) 95 N. W. 542, it was held that the defendant, in accepting a franchise from a village containing a provision that the company should not charge more than a specified rate between such village and another point upon its line, was bound thereby, notwithstanding the provisions of a franchise granted by a town through which its line was constructed authorizing it to charge a greater rate. As to penalty for excessive fare under the New York State statute, see *Goodspeed v. Ithaca St. Ry. Co.*, 2 St. Ry. Rep. 907, 88 App. Div. (N. Y.) 147, 84 N. Y. Supp. 383.

fares that might be charged for the transportation of passengers within the limits of the town. The plaintiff contends that the fare charged and collected in his case was in violation of these conditions. The first and most important question before us is whether such a condition could be imposed legally by a board of selectmen in granting a location. Under Statutes 1898, page 743, chapter 578, section 13, the board of aldermen of a city or the selectmen of a town in granting a location to a street railway company may prescribe the manner in which the "tracks shall be laid, the kind of rails, poles, wires, and other appliances which shall be used, and they may also impose such other terms, conditions, and obligations in addition to those applying to all street railways under the general provisions of law, as the public interest may, in their judgment, require." The question is whether a condition may be imposed regulating and restricting the fares to be charged. The statute contains other provisions in regard to fares. By Public Statutes 1882, chapter 113, section 43, which was in force when the defendant corporation was organized (Rev. Laws, chap. 112, § 69), the directions of a street railway company "may establish the rates of fare on all passengers and property conveyed or transported in its cars, subject, however, to the limitations named in its charter, or hereinafter set forth." Section 44 provided for a revision and regulation of the fares by the railroad commissioners, and section 45 provided that nothing contained in the two preceding sections should authorize the company or the board to raise the rate of fare above the rate established by agreement, made as a condition of location or otherwise, between the company or its directors and the mayor and aldermen of a city or the selectmen of a town, except by a mutual arrangement with the parties. This section recognizes the validity of such agreements under the former statute. But this and the next preceding section were repealed by Statutes 1898, page 748, chapter 578, section 26, leaving the section as to the authority of the directors to stand with no limitations upon their right. A new section in regard to the revision of the fares by the railroad commissioners was enacted, which is Statutes 1898, page 747, chapter 578, section 23. Under this last section "the fares shall not, without the consent of the company, be reduced below the average rate of fare charged for similar service by

other street railway companies, which, in the judgment of the board of railroad commissioners, are operated under substantially similar conditions." This statute gives to the directors primarily the right to fix and regulate fares. It then makes their action subject to revision by the railroad commissioners, who are to act, according to the terms of the section, upon broad considerations of public policy. The conditions which may be imposed in granting a location are of a different character, and do not include those for which special provision is made in other parts of the statute. See *Newcomb v. Norfolk Western Street Ry. Co.*, 179 Mass. 449, 61 N. E. 42. With street railways extending long distances and passing through numerous cities and towns, it would be unwise and inexpedient to permit each town to fix the fares within its boundaries as a condition of granting a location. The purpose of the Legislature to prescribe broad and general provisions for the regulation of fares is further emphasized by Statutes 1901, page 113, chapter 180 (Rev. Laws, chap. 112, § 73), which puts street railways upon precisely the same ground as railroads as to provisions relative to changes and regulations of their fares.

The acceptance by the defendant of the locations granted by these towns did not make valid these conditions as to fares which the towns could not legally impose, nor did it make a contract as to fares between the corporation and the selectmen or the town. The defendant might, therefore, at least prescribe for its passengers the payment of any fare which was reasonable. It is not contended that the fare collected of the plaintiff was more than was reasonable, or more than the company was accustomed to collect from other passengers who were traveling as he was. Indeed, it is contended by the defendant that it has complied with the terms prescribed by these towns, according to a proper understanding of them, certainly according to its own understanding of them, and that the charge complained of by the plaintiff was for a through passenger, to whom these conditions were not intended to apply. We need not consider this contention particularly, as we deem it unimportant. The plaintiff in his brief does not contend that he is entitled to recover, except upon the ground that the conditions imposed as to fares were binding upon the defendant.

Judgment affirmed.

Crowley v. Fitchburg & Leominster Street Railway Co.

(Massachusetts — Supreme Judicial Court, Worcester.)

EJECTION OF PASSENGER; RULE AS TO PAYMENT OF FARE OR PRODUCTION OF TRANSFER.¹— The plaintiff paid his fare upon one of the cars of the defendant and was entitled to a transfer for use upon a connecting line. The conductor to whom he paid his fare did not give him the transfer, but as the passenger was about to change to another car called to the conductor of such car that he had paid his fare and was entitled to ride. The conductor upon the latter car refused to permit him to ride and attempted to eject him. The passenger resisted and was arrested. No evidence being offered against the plaintiff he was subsequently discharged from arrest. The rule of the company required a passenger changing from one line to another to produce a transfer, or to pay his fare on the line to which he changed. The plaintiff sued to recover damages for false imprisonment. It was held that the rule requiring the production of a transfer or the payment of fare on the line to which the passenger changed was a reasonable one, and that the conductor was justified in insisting upon an observance of the rule; that the arrest and detention were justifiable under the statute providing a penalty for evading payment of fare on a street car (Rev. Laws, chap. 111, § 251).

EXCEPTIONS brought by plaintiff to judgment for defendant. Decided March 2, 1904. Reported (Mass.), 70 N. E. 56.

J. E. McConnell, for plaintiff.

Chas. F. Baker and *W. P. Hall*, for defendant.

Opinion by *MORTON, J.*

This is an action of tort to recover damages for an assault, and for a false and malicious arrest and imprisonment. The defendant operates two connecting lines of street railway on Main and Water streets in Fitchburg. A passenger paying his fare on one

1. Other cases reported in this series relating to the issue of transfers and the rights of passengers thereunder are: *Indiana Ry. Co. v. Hoffman*, 2 St. Ry. Rep. 198, (Ind.) 69 N. E. 399; *People ex rel. Lehmaier v. Interurban St. Ry. Co.*, 2 St. Ry. Rep. 751, 177 N. Y. 296, 69 N. E. 596; *Rosenberg v. Brooklyn Hts. R. Co.*, 2 St. Ry. Rep. 807, 91 App. Div. (N. Y.) 580, 86 N. Y. Supp. 871; *City of Montpelier v. Barre & Montpelier T. & P. Co.*, 2 St. Ry. Rep. 911, (Vt.) 56 Atl. 278, and monographic note on page 911, *post*; *Garrison*

is entitled to a transfer taking him to his place of destination on the other. But if he changes from one line to the other, the rules of the company require him either to produce a transfer, or in default thereof, to pay fare. The plaintiff lived on Water street, and got onto a Main street car to go to his home, changing cars at a place called "Depot Square." He offered a \$20 bill in payment of his fare. The conductor was unable to change it, but told him that he would change it when he got to Depot square, and did, taking out the fare. The Water street car was waiting, and the conductor of that car shouted to the plaintiff to "hurry up." The plaintiff turned to the conductor of the Main street car, and asked for a transfer, but the conductor said, "Never mind your transfer," and shouted to the conductor of the Water street car, who was about twenty feet away, to pass the plaintiff; that he was all right, and had paid his fare, and he (the conductor) had not time to give him a transfer. The plaintiff got upon the Water street car, and an altercation took place between him and the conductor in regard to the payment of his fare. The conductor demanded payment of fare, and the defendant refused, saying that he had paid it. The conductor took hold of him by the arm to eject him, but desisted on a threat of resistance by the plaintiff. The plaintiff did not pay his fare or produce a transfer, and the conductor called upon a policeman to arrest the plaintiff, which he did, and took him to the police station, where he was admitted to bail. The next morning the conductor made a complaint against the plaintiff, but when the case was called the plaintiff was discharged, no evidence being offered. The plaintiff offered to show that he had a conversation with one Sargent, the superintendent of the defendant company, relative to the prosecution of the complaint by the railroad company: There was no statement, if that is material, as to what the conversation was, or what the plaintiff expected to prove by it; and there was no evidence as to the authority of the superintendent, except such as might be inferred from the fact that he was superintendent. This offer, as well as an offer to

v. United Railways & Elec. Co., 1 St. Ry. Rep. 267, (Md.) 55 Atl. 371; *Perrine v. North Jersey St. Ry. Co.*, 1 St. Ry. Rep. 525, (N. J. L.) 54 Atl. 799; *Blume v. Interurban St. Ry. Co.*, 1 St. Ry. Rep. 569, 41 Misc. Rep. (N. Y.) 171, 83 N. Y. Supp. 989; *Memphis St. Ry. Co. v. Graves*, 1 St. Ry. Rep. 760, (Tenn.) 75 S. W. 729.

show that an officer and employee of the company asked for a continuance of the hearing upon the complaint, were excluded, and the plaintiff duly excepted. At the close of the evidence the court directed a verdict for the defendant, and the case is here on exceptions by the plaintiff to this ruling, and the rulings in regard to the evidence offered by the plaintiff and excluded.

We think that the rulings were right. The rule that a passenger changing from one line to the other should produce a transfer, or pay his fare on the line to which he changed, was a reasonable rule, and was known to the plaintiff. *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481. The conductor had no right to waive it or disregard it, and the plaintiff not having paid his fare on the Water street line, or produced a transfer from the Main street line, the conductor was acting within his rights, and in the performance of his duty, in attempting to eject the plaintiff from the car, and was not guilty of an assault in taking hold of the plaintiff's arm for that purpose. It is immaterial whether the conductor of the Water street car heard what was said to him by the conductor of the Main street car or not. If he did hear it, it was said to him by a conductor whose right to disregard the rules was, so far as appears, no greater than his own; and it gave the conductor of the Water street car no right to carry the plaintiff without the production of a transfer, or the payment, in default thereof, of a fare.

There is nothing to show that it came within the scope of the duty of the conductor of the Water street car to make a complaint against the plaintiff, or to cause his arrest and detention. But if it had been within the scope of his duty, the arrest and detention were clearly justified, and, therefore, the plaintiff was not harmed by the exclusion of the testimony that was offered. Rev. Laws, chap. 111, § 251; *Commonwealth v. Jones*, 174 Mass. 401, 54 N. E. 869; *Dixon v. N. E. R. Co.*, 179 Mass. 242, 247, 60 N. E. 581. The plaintiff knew that the rules of the road required the production of a transfer or the payment of a fare, and it was an evasion of fare, within the meaning of the statute, to ride without producing a transfer or paying the fare required in default thereof. *Commonwealth v. Jones, supra*; *Dixon v. N. E. R. Co., supra*.

Exceptions overruled.

Meade v. Boston Elevated Railway Co.

(Massachusetts — Supreme Judicial Court, Suffolk.)

INJURY TO PASSENGER ALIGHTING CAUSED BY SUDDEN START OF CAR.—Where there is testimony that a passenger attempted to get off after the car had stopped; that the defendant's employee in charge of the car gave the signal to start before she had alighted; that he could have seen her if he had looked, the question of the negligence of the defendant and the contributory negligence of the plaintiff is for the jury.

EXCEPTIONS by defendant from verdict for plaintiff. Decided March 31, 1904. Reported (Mass.), 70 N. E. 197.

Francis P. Garland, for plaintiff.

M. F. Dickinson and *Walter B. Farr*, for defendant.

Opinion by MORTON, J.

This is an action of tort to recover damages for personal injuries sustained by the plaintiff while alighting from an open car of the defendant company at the Park street station, in the Subway, Boston. At the close of the evidence the defendant asked the court to rule that, upon all the evidence, the plaintiff was not entitled to recover. The court refused so to rule, and submitted the case to the jury, who returned a verdict for the plaintiff. The case is here on the defendant's exceptions to the refusal of the court to give the ruling thus asked for.

We think that the ruling was right. There was evidence tending to show that the plaintiff, with two ladies and three children, took a car of the defendant company at Arlington to go to Charlestown. On arriving at the Park street station of the Subway, they alighted from the Arlington car and crossed the platform to take the Charlestown car. When that car came along, the plaintiff got on to it about the middle. Her daughter went to get into the seat in front, but, finding it full, turned back to go into the seat where the plaintiff was, and the starter pulled her back. Thereupon the plaintiff attempted to get off the car, and got as far as the running-board when the car started, and threw her down, causing the injuries complained of. There was testimony tending to show that the car was not in motion, and that no signal had

been given to start it when the plaintiff attempted to get off. It could not be said, therefore, as matter of law, that she was not in the exercise of due care in attempting to get off as she did. It was the duty of the starter to see that passengers attempting to alight had safely done so, before he gave the signal to start the car. There was testimony tending to show that he gave the signal before she had alighted, and that he could have seen her if he had looked. The plaintiff testified that she looked at him all the time while she was getting out. We do not see, therefore, how it could have been ruled, as matter of law, that there was no evidence of negligence on the part of the defendant. The question whether the accident happened as the plaintiff and her witnesses testified that it did, or as the defendant and its witnesses testified that it did, was plainly a question for the jury.

Exceptions overruled.

Glassey v. Worcester Consolidated Street Railway Co.

(Massachusetts — Supreme Judicial Court, Worcester.)

INJURY CAUSED BY REEL ROLLING FROM SIDE OF HIGHWAY INTO THE STREET.—

The plaintiff was injured by being thrown from a carriage, caused by the carriage being struck by a reel, which had contained feed wire, being rolled by boys from a place where it lay outside the traveled portion of the highway. It was held that, although the leaving of the reel in the highway was some evidence of negligence, such negligence was the remote and not the direct and proximate cause of the plaintiff's injury.

EXCEPTIONS by plaintiff from judgment for defendant. Decided March 31, 1904. Reported (Mass.), 70 N. E. 199.

A. P. Rugg and Charles W. Saunders, for plaintiffs.

Charles C. Milton and Chandler Bullock, for defendant.

Opinion by MORTON, J.

These two cases were tried and have been argued together. At the close of the plaintiffs' evidence in the Superior Court, the presiding justice ruled, at the defendant's request, that the plaintiffs could not recover, and directed verdicts for the defendant.

The cases are here on exceptions by the plaintiffs to these rulings. The case of the plaintiff Rachel, who is a married woman, is for injuries alleged to have been received by her in consequence of the negligence of the defendant in leaving a large reel by the side of or in Cameron street, in Clinton, which some boys rolled down the street, and which struck the carriage in which the plaintiff was driving, and threw her out, and caused the injuries complained of. The other action is by the husband for the loss of consortium and the expenses incurred by him by reason of the injuries to his wife.

The evidence would have warranted a finding, and, for the purposes of these cases, we assume that such was the fact, that the reel belonged to the defendant, and had had feed wire upon it, which had been strung upon its poles by persons in its employ. But it is not clear whether the reel was left on a vacant piece of land just outside the limits of the highway, or whether it was left within the limits of the highway. We assume, as most favorable to the plaintiffs, that it was left within the limits of the highway. The uncontradicted testimony shows, however, that it was left outside the traveled portion of the highway, lying on its side in the grass in a secure position. The plaintiffs introduced in evidence a by-law of the town forbidding persons to leave obstructions of any kind in the highway without a written license from the road commissioners or other board having charge of the streets, and they contend that, if the reel was left within the location of the highway, when forbidden by the by-law, that of itself constituted such negligence as renders the defendant liable. But the most, we think, that can be said of this contention, is that the leaving of the reel within the limits of the highway was evidence of negligence, not that in and of itself it rendered the defendant liable, or should be held, as matter of law, to have contributed directly to the accident. *Hanlon v. South Boston R. Co.*, 129 Mass. 310. The question is whether, in leaving the reel lying on its side in the grass, near the road, the defendant ought reasonably to have anticipated that children passing along the street on their way to school, or for other purposes, would take it from the place where it had been left, and engage in rolling it up and down the street, and that travelers on the highway would thereby be injured.

The question is not whether a high degree of caution ought to have led the defendant to anticipate that such a thing might possibly occur, but whether it ought reasonably to have been expected to happen in the ordinary course of events. In the former case the defendant would not be liable, and in the latter it might be held liable, notwithstanding an active human agency had intervened between the original wrongful act and the injury. The case of *Stone v. Boston & Albany R. Co.*, 171 Mass. 543, 51 N. E. 1, 41 L. R. A. 794, furnishes an illustration of the former class of cases, and the case of *Lane v. Atlantic Works*, 111 Mass. 136, of the latter. It is clear that the plaintiff Rachel was in the exercise of due care. But assuming that the reel was left in the highway, and that that was some evidence of negligence, we think that such negligence was the remote, and not the direct and proximate, cause of the plaintiff Rachel's injury. The material facts, with the inferences to be drawn from them, are not in dispute, and in such a case the question of remote or proximate cause is one of law for the court. *Stone v. Boston & Albany R. Co.*, 171 Mass. 543, 51 N. E. 1, 41 L. R. A. 794; *McDonald v. Snelling*, 14 Allen, 290, 299, 92 Am. Dec. 768; *Hobbs v. London Southwestern R. Co.* (1875), L. R. 10 Q. B. 111-122. The defendant's servants left the reel in a secure position, lying on its side in the grass, outside the traveled part of the street, and not in immediate proximity of it. As the reel was left, it was entirely safe. It was not possible for a slight or accidental movement to set it in motion so as to injure others, as in the case of *Lane v. Atlantic Works*, *supra*. The reel was large and cumbersome, and required active effort on the part of a number of children to move it from the place where it had been left onto the traveled part of the highway, and set it in motion. And in order to injure the plaintiff or any other traveler on the highway, it was necessary that it should be set in motion at a time when the plaintiff or other travelers were passing along the highway. In other words, in order to render the defendant liable, it must appear not only that it should have anticipated that, in the ordinary course of events, school children would take the reel from the position where it had been securely left, outside the traveled part of the road, but that they would set it in motion on the highway under such circumstances that it was liable to injure a traveler thereon. It seems to us that,

conceding that there was evidence of negligence on the part of the defendant in leaving the reel where its servants did, they could not be required to anticipate that this would happen in the ordinary course of events, and, therefore, that the negligence was too remote. See *Speaks v. Hughes* (1904), 1 K. B. 138.

Exceptions overruled.

People v. Detroit United Railway Co.

(Michigan — Supreme Court.)

ORDINANCE REQUIRING EQUIPMENT OF CARS WITH AIR OR ELECTRIC BRAKES.—

A municipal ordinance requiring the equipment of street cars with air or electric brakes is a reasonable regulation of the conduct of a street railway company's business, and is not a violation of a statute (Mich. Comp. Laws, §§ 6425, 6447), providing that when a franchise is granted to a street railway company the municipal authorities shall make no regulations destroying it. Where the ordinance appears upon its face to be a safeguard against danger to the public it will ordinarily be presumed to be valid. If the regulation can fairly be said to tend toward a better and safer condition, the discretion of the common council in passing the ordinance will not be interfered with.¹

1. MUNICIPAL CONTROL OF STREET RAILWAYS.

1. Conditions imposed by franchise.
2. General power of municipality to regulate operation.
3. Municipal control under reservation contained in franchise.
4. Reasonableness of regulations.
 - a. Presumption in favor of reasonableness.
 - b. Test as to reasonableness.
5. Subjects of regulation.
 - a. As to speed of cars.
 - b. Requiring car to stop before crossing intersecting street.
 - c. Vigilant watch ordinances.
 - d. Ordinance requiring cars to run at certain times.
 - e. As to equipment of cars.
 - f. Use of salt or sand on tracks.
 - g. Removal of snow and ice.
 - h. Regulation of rates of fare.
 - i. Requirements as to employees.

1. Conditions imposed by franchise.—The statutory authority conferred upon municipalities to grant franchises for the use of streets by street railroad companies usually includes either expressly or impliedly the power to

CERTIORARI by defendant to review a judgment subjecting it to a penalty for failing to provide certain brakes for its cars. Decided November 9, 1903. Reported (Mich.), 97 N. W. 36.

Brennan, Donnelly & Van De Mark, Charles D. Joslyn, and Henry L. Lyster (Michael Brennan and John J. Speed, of counsel), for appellant.

Timothy E. Tarsney, P. J. M. Hally, and Charles E. Love, for the People.

Opinion by HOOKER, C. J.

The defendant is a street railway company, and was convicted and fined in the Recorder's Court of the city of Detroit for the violation of an ordinance of said city. The cause is here upon certiorari.

regulate and control within reasonable limits the operation and management of the business of such companies. Conditions which are for the benefit of the public, which are proper in character and are not prohibited either actually or explicitly may be properly exacted of the company to whom a franchise is granted. *Gaedeke v. Staten Island & M. R. Co.*, 43 App. Div. (N. Y.) 514, 60 N. Y. Supp. 598. As is said by Mr. Nellis in his work on Street Surface Railroads, p. 105: "The power of municipal authorities to grant or withhold consent to the construction of street railroads is absolute, and they may impose any conditions, however onerous or difficult to perform, which do not limit or restrict the rights of the public, as the terms upon which their consent will be given."

If the company is unwilling to accede to the conditions imposed it may refuse to accept the franchise; but if the franchise is accepted and the company acts upon the consent of the municipality expressed therein, it must comply with the conditions under which it is granted. See *People ex rel. W. S. St. Ry. Co. v. Barnard*, 110 N. Y. 548, 18 N. E. 354; *Central R. E. Company's Appeal*, 67 Conn. 197, 35 Atl. 32; *People v. Chicago W. Div. Ry. Co.*, 118 Ill. 113, 7 N. E. 116; *Louisville Trust Co. v. Cincinnati*, 73 Fed. 716.

It has been held that a municipality might impose as a condition under which a franchise shall be granted that the municipality shall reserve the right to reasonably control the rate of fare to be charged (*Gaedeke v. S. I. & M. R. Co.*, 46 App. Div. (N. Y.) 220; *Cleveland City Ry. Co. v. City of Cleveland*, 12 Ohio C. D. 635. *Contra*, *Keefe v. Lexington & B. St. Ry. Co.*, 2 St. Ry. Rep. 450, (Mass.) 70 N. E. 37); the time for constructing the railroad may be limited therein (*Hutchinson v. Borough of Belmar*, 62 N. J. L. 450, 45 Atl. 1092; *Dusenberry v. N. Y., W. & N. C. T. Co.*, 46 App. Div. (N. Y.) 267); license fees or percentage taxes may be exacted based upon gross receipts or otherwise determined (*Byrne v. Chicago, etc., R. Co.*, 63 Ill.

There is no doubt of the violation of the ordinance. The cause being tried without a jury, the court determined the question of the reasonableness of said ordinance, which appears to have turned upon questions of fact. Counsel for the defendant say in

App. 438, affirmed, 169 Ill. 75, 48 N. E. 703; *Mayor v. Broadway & Seventh Ave. R. Co.*, 17 Hun (N. Y.), 242; but this power does not exist where the company is organized under a contract with good consideration expressly conferring rights and powers, and defining upon what terms it might use the streets and run its cars (*Mayor v. Third Ave. R. Co.*, 117 N. Y. 404, 22 N. E. 755; *Mayor v. Third Ave. R. Co.*, 33 N. Y. 42); but a condition may be imposed that disputes between the railroad company and its employees shall be submitted to arbitration (*Wood v. Seattle*, 23 Wash. 1, 62 Pac. 135); and it has been held that the traffic may be limited in the franchise strictly to the carriage of passengers, although the charter of the company authorizes it to carry freight and express matter (*St. Louis & M. R. Co. v. Kirkwood*, 159 Mo. 239, 60 S. W. 110, 53 L. R. A. 300. But see *Lincoln St. Ry. Co. v. Lincoln*, 61 Nebr. 109, 84 N. W. 802).

2. General power of municipality to regulate operation.—The Legislature, when it authorized the use of public streets for street railroad purposes, was presumed to have intended that the grantee of the franchise should hold its privileges subject to such regulations as were reasonably necessary for the common use of the street for a street railroad and for ordinary travel. Nearly all kinds of reasonable regulations can be imposed upon street railroads in the use of streets by a municipality under the authority granted by the Legislature to pass ordinances to regulate the use of the streets, and such regulations are never declared unlawful on the ground that they impair the franchises of the company. Street railway companies hold their franchises subject to such municipal regulations as do not unreasonably interfere with the exercise of the franchises conferred by the Legislature. The operation of street railways must be reasonably safe, reasonably consistent, and in harmony with the legal customary use of the street by the general public; and ordinances to enforce this rule of law are reasonable in purpose and effect. A grant to a street railway company of the right to own property and to transact business in the streets of a municipality confers no immunity from any police control to which a citizen could be subjected, and a reasonable regulation of the enjoyment of the franchise is not a denial of the right nor an invasion of the franchise or a deprivation of its property, or an interference with the business of the company. The company is presumed to know that the business of operating a city street railway must be conducted under such reasonable rules and regulations as the municipality may impose, and subject to its share of the burdens incident to the conduct of the municipal government. *Cape May, Delaware Bay & S. P. R. Co. v. City of Cape May*, (N. J. L.), 6 Am. Electl. Cas. 49; *Nellis Street Surface Railroads*, p. 205.

A municipal corporation having the right to regulate the use of streets

their brief that "there can be but one question for this court to decide; *i. e.*, is it a reasonable regulation to require the defendant company to equip its cars with air or electric brakes?" The railroad was constructed under the statutes existing at different times,

over which the cars of a street railroad company run, has the power to impose such reasonable conditions upon the company's enjoyment of the franchise as in their judgment the interests of the public seem to require. *Hudson River Telephone Co. v. Watervliet, etc.*, R. Co., 135 N. Y. 393, 32 N. E. 148, 31 Am. St. Rep. 838; *Mayor v. Dry Dock, etc.*, R. Co., 133 N. Y. 104, 30 N. E. 563, 28 Am. St. Rep. 609. The State Legislature, in authorizing a street railway company to make use of public streets, did so subject to the subordinate power of municipal corporations to enact such ordinances as do not unreasonably interfere with the exercise of a franchise. *Consolidated Traction Co. v. City of Elizabeth*, 58 N. J. L. 619, 34 Atl. 146, 32 L. R. A. 170; *City of Detroit v. Ft. Wayne & Belle Isle Ry. Co.*, 95 Mich. 456, 54 N. W. 958, 35 Am. St. Rep. 580; *Union Depot R. Co. v. Southern Ry. Co.*, 105 Mo. 562, 16 S. W. 920.

3. **Municipal control under reservation contained in franchise.**—If the municipal ordinance under which a street railroad is operating contains a reservation of the right "to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public," the right is reserved to enact an ordinance providing that the railway company shall, for the accommodation of the public, keep tickets for sale upon the cars. It cannot be contended that the relation created by the first ordinance was contractual, and at the same time that the reservation was of the right to enact police regulations only. The right to exercise police power exists independent of the reservation, and cannot be bartered away. The contract relation created by such an ordinance is not one-sided nor intended as a shield for the railway company alone. *City of Detroit v. Ft. Wayne & Belle Isle Ry. Co.*, 95 Mich. 456, 54 N. W. 958, 35 Am. St. Rep. 580.

4. **Reasonableness of regulations.** a. **Presumption in favor of reasonableness.**—The presumption is in favor of the reasonableness of a municipal ordinance and the burden of proof must be assumed by one who resists it as unreasonable. In the passage of a general ordinance affecting subjects of municipal administration, it will be presumed that the common council acted in the exercise of judgment upon the facts, and for reasons calling for such legislative action. The adoption of the ordinance is not, however, conclusive evidence of its reasonableness, and any person affected by it may rebut this presumption by giving in evidence facts showing that in his case its enforcement would be unreasonable. *Mayor v. Dry Dock, etc.*, R. Co., 133 N. Y. 104, 30 N. E. 563, 28 Am. St. Rep. 609.

b. **Test as to reasonableness.**—The test of the reasonableness of a municipal ordinance regulating the operation of a street railroad is whether it is

when different sections were built; the present status of the company being the outcome of various purchases or consolidations, or both. All of said statutes required the consent of the city authorities, and this was given in the various instances. The follow-

reasonably designed to guard some public or private right from threatened injury from the operation of street railway cars. *State, Cape May, Delaware Bay & S. P. R. Co. v. City of Cape May* (N. J. Sup. Ct.), 6 Am. Electl. Cas. 49. It is within the inherent police power of a municipal corporation to regulate or restrain the use of electricity as a motive power within the corporate limits, and any ordinance justified by the danger of such use cannot be regarded as unreasonable. *Van Hook v. Selina*, 70 Ala. 361; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37; *State ex rel. Wisconsin Telegraph Co. v. Janesville St. Ry. Co.*, 5 Am. Electl. Cas. 289, 87 Wis. 72, 57 N. W. 970; *Sioux City St. R. Co. v. Sioux City*, 138 U. S. 98, 34 L. Ed. 898.

5. **Subjects of regulation.** a. **As to speed of cars.**—Municipal authorities have the right and duty, by legislation, to regulate the rate of speed for the operation of street cars upon the streets within the corporate limits; and the right and duty exists by virtue of the police power which the authorities have and should exercise for the protection of individuals and their property when legally using the streets. *Nellis Street Surface Railroads*, p. 225; *Dill. Mun. Corp.* (4th ed.), § 713; *Western & A. R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; *Chicago, B. & Q. R. Co. v. Haggerty*, 67 Ill. 113; *Cleveland, C. C. & I. Ry. Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37; *Whitson v. City of Franklin*, 34 Ind. 392; *Bluedorn v. Missouri Pacific Ry. Co.*, 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615; *Gratiot v. Missouri Pac. Ry. Co.*, 116 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189; *Merz v. Missouri Pac. Ry. Co.*, 88 Mo. 672; *Robertson v. Wabash, St. Louis & P. Ry. Co.*, 84 Mo. 119; *Pennsylvania Co. v. James*, 81 Pa. St. 194. Many of the cases here cited are cases involving the right of municipalities to control the speed of steam railroad trains within their limits. These cases are, however, applicable to the regulation of the speed of street railway cars.

In the case of *Bly v. Nashua St. Ry. Co.*, 67 N. H. 474, 32 Atl. 764, 68 Am. St. Rep. 681, 30 L. R. A. 303, it was held that a statute providing that "no person shall ride through any street in the compact part of any town, on a gallop or at a swifter pace than at the rate of five miles an hour" applies to a street railway company whose charter provides that the mayor and aldermen of the city in which its railway is operated may make such regulation as to rate of speed and mode of the use of the railway as the public safety and convenience may require, if the mayor and aldermen have not made any such regulation. An ordinance requiring that cars to be used on a surface railroad "shall be drawn by horses or mules only, at a speed not exceeding the rate of seven miles per hour," was held not to be repealed by a subsequent municipal ordinance giving the surface railroad company the

ing reservation of power is contained in such consent, and is applicable to the present case: "It is hereby reserved to the common council of the city of Detroit the right to make such further rules, orders, or regulations as may from time to time be deemed

right to construct, maintain, and operate an overhead trolley electric system. *Martineau v. Rochester Ry. Co.*, 81 Hun (N. Y.), 263, 30 N. Y. Supp. 778.

A street railroad company is not given the right to run its cars at any desired rate of speed, by a charter giving it the paramount right of way upon city streets, but must regulate the speed so that the cars may be quickly stopped should it be required to avoid an accident. *Gosness v. Toronto Ry. Co.*, 21 Ont. App. 553.

b. *Requiring car to stop before crossing intersecting street.*—A city having authority under its charter to regulate the use of public streets and highways can enact an ordinance to compel passenger cars operated by trolley or electric power to come to a full stop before crossing intersecting streets; and such an ordinance, if enacted in the manner prescribed by the charter of the city, is legislative in its character, and will not be set aside as unreasonable in its purpose or effect. *Cape May, Delaware Bay & S. P. R. Co. v. City of Cape May*, 6 Am. Electl. Cas. 45, (N. J. Sup. Ct.). Regulations may be made requiring street railway cars to stop at designated places in order to accommodate passengers and prevent unnecessary obstructions to public travel, as well as to avoid danger of accidents to others in the ordinary use of the streets and other public places. *Railroad Co. v. Calderwood* (Ala.), 7 So. 360.

Electric street railway cars can be propelled at a very rapid rate of speed along the streets and over the crossings and intersections thereof and through public places, with great danger to those using such crossings. In view of these dangers it is incumbent upon street railway companies to exercise a degree of care and caution to avoid accidents commensurate with the risks involved. This degree of care is a reasonable one, in view of the probabilities of danger, and the exercise of this care for the protection of the general traveling public can be enforced by ordinance. A regulation that the cars shall stop at every street before crossing is a reasonable one, which does not interfere with the exercise of a street railway franchise, and would in most cases appear to be necessary to protect the public from the dangers incident to the crossing.

c. *Vigilant watch ordinances.*—Ordinances may be enacted requiring that motormen and conductors shall keep a vigilant watch for persons or vehicles on or moving toward its tracks, and on the first appearance of danger to such persons or vehicles, that the car shall be stopped in the shortest time and space possible. Such an ordinance, unless too indefinite to be reasonable, may be enforced. *Fath v. Tower Grove & L. Ry. Co.*, 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74; *Liddy v. St. Louis R. Co.*, 40 Mo. 506; *Murphy v. Lindell R. Co.*, 153 Mo. 252, 54 S. W. 442.

necessary to protect the interest, welfare or accommodation of the public in relation to street railways." In the same connection should be read sections 6425 and 6447 of the Compiled Laws, viz.:

"All companies or corporations formed for such purpose shall have the exclusive right to use and operate any street railway constructed, owned or held by them. That no such company or corporation shall be authorized to

d. Ordinance requiring cars to run at certain times.—Under a charter which reserves to a city the right to regulate the time and manner of using the streets for street railway purposes, such city may pass an ordinance requiring the company to run its cars during certain periods of the day at intervals of not less than twenty minutes. *City of New York v. N. Y. & H. R. Co.*, 10 Misc. Rep. (N. Y.) 417, 31 N. Y. Supp. 147. An ordinance requiring a street railway company to run its cars not less than one every twenty minutes between the hours of 12 o'clock, midnight, and 6 o'clock in the morning, while presumed to be reasonable, may be avoided by proof that the convenience of passengers did not require the running of cars during the hours specified, where it appears that the charter of the company contains a provision that it shall run cars as often as the convenience of passengers may require, and be subject to such reasonable rules and regulations in respect thereto as the common council may prescribe. Evidence that cars were run in compliance with the ordinance and were generally not patronized even in carrying a single passenger, tends to prove that the convenience of passengers did not require cars to be run during the hours specified at such frequent intervals, and, therefore, that the ordinance was unreasonable. *Mayor v. Dry Dock, etc., R. Co.*, 133 N. Y. 104, 30 N. E. 563, 28 Am. St. Rep. 609.

e. As to equipment of cars.—A city council, under the charter of a city conferring authority to make ordinances regulating the use of streets for the protection of persons and property thereon, may enact an ordinance that all passenger cars operated by trolley or electric power in the streets of the city shall have proper and suitable fenders on the front of such cars to prevent accident, and that it shall be unlawful to operate such cars in the streets without such fenders. *State, Cape May, Delaware Bay & S. P. R. Co. v. City of Cape May* (N. J. Sup. Ct.), 6 Am. Electl. Cas. 49.

Where a general law confers exclusive jurisdiction upon a State railroad commission to require the use of fenders on street cars and repeals all inconsistent acts, resolutions, and by-laws, the common council of a city cannot, after the passage of such act, make it a condition for the approval of a plan for a street railway, that the company keep its cars at all times equipped with such fenders as shall be satisfactory to its street committee. *Appeal of Central Ry. & Elec. Co.*, 67 Conn. 199, 35 Atl. 32.

The common council of a city cannot direct that during the winter months no car should be operated upon any street railroad of the city unless such car should have a vestibule built upon each end thereof sufficient to afford protection from the weather to motormen, conductors, and others standing

construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe."

"Provided further, that after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights of

upon the platform of such cars. *City of Yonkers v. Yonkers R. Co.*, 51 App. Div. (N. Y.) 271, 64 N. Y. Supp. 955, holding that an ordinance of such a character, however reasonable it may be in itself, is to be condemned as an exercise of a power not inherent to municipal existence and as an interference with the affairs of the defendant, which the Legislature has failed, and apparently refused to authorize, and as the assertion of a right on the part of the city which it did not, as far as appears, reserve to itself as a condition of the consent to the use of its streets by the company.

f. *Use of salt or sand on tracks.*—An ordinance prohibiting the use of salt on a street railroad track, except on curves at street corners, is not invalid as an impairment of the franchise of the company, or a restriction of the operation of its road, merely because it will occasion inconvenience, or involve expense, or prevent the company from operating its road so successfully; evidence that the use of salt is necessary to make it possible to run street cars at a low place in which the water gathers during the day and freezes at night is not sufficient to show that the ordinance prohibiting its use is unreasonable, since it does not appear that the water cannot be diverted from the tracks at a reasonable expense. *State, Consolidated Traction Co. v. City of Elizabeth*, 58 N. J. L. 619, 34 Atl. 146, 32 L. R. A. 170.

Under the provisions of a city charter authorizing a city to regulate the use of the streets and to prevent the throwing of ashes, etc., on the streets, the city has authority to adopt an ordinance granting a street railway company the right to sprinkle sand on the track from November 1st to April 1st, and prohibiting its use at all other times. *Dry Dock, E. B. & B. R. Co. v. City of New York*, 47 Hun (N. Y.), 221.

g. *Removal of snow and ice.*—The duty is imposed upon each municipality to remove obstructions from the streets and to keep the streets in a condition for travel; and in the performance of this duty it has the right to regulate the use made by street railway companies of snow plows which pile up the snow upon both sides of the tracks and prevent the use, either by the abutting owners or by the general public, of any other part of the street for the purpose of passage or access to their own premises. *Nellis Street Surface Railroads*, p. 230, and cases cited thereunder.

Under the authority conferred upon a municipality by its charter to make necessary regulations for the security, welfare, and convenience of the city and its inhabitants, such city may require street railroad companies to prevent dust on their tracks by keeping the tracks well watered. *City & Sub. R. Co. v. Savannah*, 77 Ga. 731, 4 Am. St. Rep. 106.

the franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the rights of constructing, maintaining and operating such railway in the streets, in such consent or grant named, pursuant to the terms thereof."

"After any city, village or township shall have consented, as in this act provided, to the construction and maintaining of any street railway therein or granted any rights or privileges to any such company and such consent and grants have been accepted by the company, such township, city or village shall not revoke such consent nor deprive the company of the rights and privileges so conferred."

The ordinance provides as follows: "Section 1. On and after May 1st, 1902, no street car or cars shall be operated or run on any street, avenue or highway in the city of Detroit, unless the same be equipped with air or electric brakes." Section 2 provides that no street railway company nor any officers thereof "shall run or operate, or permit to be run or operated, any car upon or in any street or avenue in said city, unless the same is equipped with air brakes." Section 3 provides the penalty.

h. Regulation of rates of fare.—The rates of fare upon street surface railroads are usually regulated by statute. As stated by Mr. Nellis in his work on *Street Surface Railroads*, p. 221: "Although by its charter a railroad corporation is given power to fix rates, such power is subject to change unless clearly stipulated to the contrary. But neither the Legislature, nor any commission acting under the authority of the Legislature can establish, arbitrarily and without regard to justice and right, a tariff of rates for fares and transportation which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business, on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation, on the other." See also cases cited in connection with this statement.

The Legislature may delegate to the municipal authorities the power, within reasonable limits, to fix the rates of fare and to adopt and enforce ordinances in respect thereto, although general statutes exist upon the same subject. *Railroad Co. v. Ryan*, 56 Ark. 248, 19 S. W. 839; *Indianapolis v. Navin*, 150 Ind. 144, 47 N. E. 526, 41 L. R. A. 340 (sustaining an ordinance for a three cent fare); *Forman v. New Orleans & C. R. Co.*, 40 La. Ann. 446, 4 So. 246; *Sternberg v. State*, 36 Nebr. 307, 54 N. W. 553, 19 L. R. A. 570; *Ellis v. Milwaukee City Ry. Co.*, 67 Wis. 135, 30 N. W. 218, 58 Am. Rep. 858.

The rights and franchises of a street railway company are not destroyed or unreasonably impaired by a city ordinance requiring it to sell tickets to all persons applying therefor on each of its cars, and to be good for transportation over its entire route or any portion thereof traveled continuously

Counsel for the defense introduced testimony tending to show that it had several hundred cars in the city, and that it would cost \$350,000 to equip them with the prescribed brakes; that many of such cars were single-truck cars; that it was replacing those as rapidly as it could consistently with double-truck cars; that, while said brakes would be useful upon large suburban cars, which make few stops, they are not well adapted to use upon cars which make frequent stops, such as cars run upon city lines exclusively, or to small single-truck cars; that all cars are equipped with sufficient hand brakes, and that they cannot be safely dispensed with; that they are more certain in their action than the brakes prescribed, and consequently safer; that their average efficiency is greater, and that no city is known to have all of its railroad cars equipped with air or electric brakes; that such brakes are in an experimental stage; that they have been repeatedly tried and discarded in cities; and that, if used, they increase the danger of

either way between certain hours, at the rate of eight tickets for twenty-five cents. Such an ordinance may provide for its enforcement by making each day's neglect to comply therewith an offense punishable by fine, and authorizing the collection of such a fine in an action at law. *City of Detroit v. Ft. Wayne & Belle Isle Ry. Co.*, 95 Mich. 456, 54 N. W. 958, 35 Am. St. Rep. 580; *Sternburgh v. State*, 36 Nebr. 307, 54 N. W. 553, 19 L. R. A. 570.

i. *Requirements as to employees.*—The passage of an ordinance requiring a street car company to put "a driver and a conductor" on each car is a proper exercise of the city's police power, and is not an impairment of the company's rights, not being unreasonable or oppressive. *South Covington, etc., Ry. Co. v. Berry*, 93 Ky. 43, 18 S. W. 1026, 40 Am. St. Rep. 161, 15 L. R. A. 604 (in this case the city charter gave the city council power to pass all ordinances necessary for the due administration of justice and the better government thereof, and to cause the removal or abatement of any nuisance); *State v. Inhabitants of Trenton*, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410.

In the case of *Brooklyn Crosstown R. Co. v. City of Brooklyn*, 37 Hun (N. Y.), 413, it was held that a city ordinance requiring both a driver and a conductor upon a horse car was invalid since the city had no power to enact such an ordinance, the Legislature having reserved to itself the power to regulate such matters. In the case of *State ex rel. Columbia Elec. St. Ry. Co. v. Sloan*, 6 Am. Electl. Cas. 57, 48 S. C. 21, 25 S. E. 898, it was held that under a statute giving the municipal authorities of a city power to make all such ordinances relative to streets as they may think proper and necessary, such authorities had power to require that electric street cars should not be run without conductors.

accident, both by reason of the uncertainty of their action when an attempt is made to use them, and the uncertainty in the minds of motormen which brake had better be used in cases of emergency. There was testimony offered in opposition. The object of this ordinance is to compel the equipment of street cars with the means of stopping with certainty and expedition. We may take judicial notice that this is desirable, for we are judicially cognizant of the fact that the use of street cars is necessarily attended by imminent danger to citizens who are upon the highway, as well as passengers. It is contended that this ordinance is invalid — first, because it can be said not to provide for brakes which will tend to lessen danger; second, because its enforcement will require an outlay large in comparison with the benefits which would result from the use of such brakes as are required by it. A large amount of testimony was taken upon both these questions, and this was passed upon by the trial judge, who has held the ordinance valid.

It is past controversy that the city may regulate the conduct of defendant's business to the extent of requiring reasonable safeguards against danger. *Nellis Surface Roads*, pp. 206, 219; *City v. Michigan Traction Co.*, 126 Mich. 525, 86 N. W. 130; *Detroit v. Railway Co.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; *L. S. & M. S. R. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; *Chicago & A. R. Co. v. Carlinville*, 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 394; and other cases cited in briefs of counsel. Many regulations are permissible, although in all or most instances they involve some limitation on the liberty or burden upon the property of individuals. Sanitary regulations are common, including the abolition of slaughter-houses and other noxious places, and restrictions upon burrial. Protection against fire and danger from explosions, the use of highways and speed of vehicles, the regulation of occupations, buildings, etc., are among the many instances where municipal action is upheld. An ordinance, which on its face shows that such end was in contemplation, will ordinarily be presumed to be valid. See 21 Am. & Eng. Encyc. of Law, 978, and cases cited; Booth Street Ry. Law, § 224; Cooley Const. Lim. (6th ed.) 241, note; *Nellis Surface Roads*, 215. Not only will the burden of proof be upon one who attacks its validity, but

the discretion of the council will not be interfered with upon light grounds, or where the regulation can fairly be said to tend toward a better and safer condition.

The ordinance in question punishes the operation of a car not equipped with air or electric brakes. This ordinance is in harmony with the statute (Comp. Laws, § 6280), which for many years has required the equipment of steam passenger cars with air brakes. Before we should say that a similar requirement as to street cars is unreasonable, and, therefore, invalid, it should be made to appear clearly either that there is no necessity for a more efficient brake than a hand brake upon street cars, or that neither an air nor an electric brake would be such; and if, as is contended, and apparently conceded, the hand brake is not to be dispensed with, it would be necessary to show that a car equipped with both would not be safer than with the hand brake alone.

Counsel urge that the uncontradicted evidence shows that this ordinance is unreasonable. We think not, and, if it might be said that a preponderance of the oral testimony supports that view, we think that would be insufficient to justify us in nullifying the ordinance. We may take judicial notice that atmospheric or vacuum brakes are in general use on passenger trains, that they are common upon freight cars and trains, and that they are rarely ineffective. The record shows that they are in use on electric cars of the larger type, both on suburban lines and on city roads. If they were not, it is patent that they could be; and, while counsel contend that they could not be applied to small cars, it has not been satisfactorily proven. It is not improbable that the exact device used on large cars might not be adapted to use on a small one (especially where but one set of trucks is used) without some modification; but that is not shown to be mechanically difficult, and every one knows that such problems are being solved daily in the realm of mechanics. Moreover, there is proof that one or more small cars have been equipped and successfully run with them. The validity of an ordinance cannot be made to depend upon what a trial judge, a justice of the peace, or a jury may conclude from the testimony and opinions of such witnesses as may happen to be brought into court in the first case that arises, where, as in this case, its provisions, when viewed in the light of facts,

of which the courts may take judicial notice, are reasonable, and clearly within the discretion of the council, either by virtue of a reserved power resting in contract, or the police power.

We do not feel called upon to say much about the claim that this ordinance should be held invalid upon the ground that it will require a large outlay, or that it takes property without due process of law. It is too well settled that the State or city may enforce regulations clearly looking to the safety of the public, and reasonably adapted to such end to make it necessary. All property is held subject to the exercise of the police power. See *Carthage v. Frederick*, 122 N. Y. 268, 25 N. E. 480, 10 L. R. A. 178, 19 Am. St. Rep. 490; *Attorney-General v. Jochim*, 99 Mich. 371, 58 N. E. 611, 23 L. R. A. 699, 41 Am. St. Rep. 606. In *Cooley Const. Lim.* 708, it is said:

"All contracts and all rights, it is declared, are subject to this [police] power, and not only may regulations which affect them be established by the State, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as circumstances may change, or as experience may demonstrate the necessity."

See cases cited in note to last authority. It has been urged that the proof shows that a light car can be as effectively handled and controlled by hand as by power brakes, and there is proof to that effect, and also that electric or air brakes are less reliable than hand brakes on such cars. This point is covered by what has been said. If the air brake or electric brake is more liable to get out of repair, and there is difficulty in stopping the car at a given point, it is not shown that proper supervision would not assure effective brakes at all times, and that the employment of skilled or experienced motormen would not overcome the latter difficulty. But, if not, the evidence as well as common experience shows that a power brake is quicker in its action, and in emergencies where human life is involved in delay expeditious stopping of a car should not yield to possible inconvenience in the matter of stopping places.

It is also said that the ordinance is invalid even if air brakes can be said to be effective, because it does not designate between air and electric brakes, which last are said to be clearly shown to

be ineffective. We think there is no force in this point. It is not to be presumed that any one will use the latter under such circumstances. Defendant certainly is not required to.

The conviction is affirmed.

MOORE, CARPENTER, and GRANT, JJ., concurred.

MONTGOMERY, J. (concurring).

It is the contention of defendant that the ordinance in question is unreasonable, and that for this reason it should not be enforced. That there is a limitation upon the power of a municipal legislative body, which the courts have the right to enforce, and that an ordinance which is unreasonable in its terms is beyond the power of such legislative body to enact, is well settled. There can be no doubt, either, that where, upon the face of the ordinance, it is shown to be unreasonable, the question which the courts have to determine becomes purely a question of law. But that is not this case. In the present case the contention is that the ordinance is unreasonable, as shown by the testimony of the facts and circumstances; in other words, that, although the court would not be able to say on the face of the ordinance that it is unreasonable, yet because of the existence of certain facts, which it is claimed the testimony establishes in the case, the court should hold that the ordinance is unreasonable. These facts are not facts of which the court can take judicial notice, but are facts claimed to be proven in the case, and the question is, who is to determine these facts? It may be conceded that the authorities are not agreed upon the question, and it becomes necessary to look somewhat to the reason of the rule.

The rule is stated in Dillon Municipal corporation, § 327, as follows: "Whether the ordinance be reasonable and consistent with the law or not is a question for the court, and not the jury, and evidence to the latter on this subject is inadmissible. But in determining this question the court will have regard to all the circumstances of the particular city or corporation, and the object sought to be attained, and the necessity which exists for the ordinance." This statement of the law is strictly accurate if it be limited to cases in which the question depends upon facts of which the court may take judicial cognizance. But there are cases which

go further, and hold that, where the question of reasonableness depends upon facts, while it may be competent for the court to take testimony as to these facts, and to take into consideration the validity of the ordinance, the question is in no case a question for the jury; in other words, that it is to be determined as a question of law, and not as a question of fact. One of the strongest cases supporting this view is that of *Illinois Cent. R. Co. v. Whittemore*, 43 Ill. 420, 92 Am. Dec. 138. In that case it was said: "It was proper to admit testimony, as was done; but either with or without this testimony it was for the court to say whether the regulation was reasonable, and, therefore, obligatory upon the passengers. The necessity of holding this to be a question of law, and, therefore, within the province of the court to settle, is apparent from the consideration that it is only by so holding that fixed and permanent regulations can be established. If this question is to be left to juries, one rule would be applied by them to-day and another to-morrow. In one trial a railway would be held liable, and in another, presenting the same question, not liable. Neither the companies nor passengers would know their rights or their obligations." The reason assigned in this opinion appears to be the one upon which the rule rests so far as it has been adopted, viz., the idea that when, in a particular case, an ordinance is determined to be unreasonable, that determination will control in all future cases that may arise under the ordinance, whether the question arises between the same parties or not. If the reason of the rule fails, the rule should fail. It is certainly anomalous to hold that A. may be concluded in a proceeding between B. and C., to which A. is not a party, when that judgment rests upon a determination by some one of a question of fact. The whole realm of adjudicated cases may be searched in vain for another instance of this character. The very reason upon which the rule rests refutes the rule. So far from its being true that in a proceeding depending upon a question of fact future litigants should be finally concluded, the exact reverse is true, and an ordinance which may be declared upon a certain state of facts proven to the court or jury to be invalid in a proceeding depending between A. and B. in which there may be involved a trifling amount, cannot be held to conclude C., who may have vested rights to the amount of

thousands of millions of dollars. To illustrate: Suppose in an action between third parties it had been determined that the original franchise granted to this defendant was invalid as wholly unreasonable, can the vested rights of this corporation be said to have been divested in a proceeding to which it was not a party? Such a proposition shocks the sense of justice, and fortunately we are not without authorities which have a direct bearing upon this question.

In the case of *Pennsylvania R. Co. v. Jersey City*, 47 N. J. L. 286, a proceeding was commenced for the purpose of having an ordinance of the city declared invalid as unreasonable, and it was said:

"This proceeding in error seeks the abolition of this ordinance *in toto*, and, as a whole, it is plainly not open to the imputation of unreasonableness. Its scope is to put upon a proper footing the use of railroad trains within the municipal bounds, and there is no pretense that it presses unduly upon any of such companies, except that it harasses the plaintiff in error in passing its numerous trains across three certain streets near its terminal depot. But, conceding this allegation to be true, that the business of the plaintiff in error at this particular locality is by that ordinance unreasonably embarrassed and burthened, such a vice in the by-laws would not render it generally, but only specially, inefficacious; that is, the court would not vacate the entire ordinance, but merely refuse to put it in effect in that part of it that was thus unreasonable."

And a somewhat analogous question has arisen in the Federal courts. As is well understood, the Federal courts have held that under the Fourteenth Amendment a statute of a State regulating freight or passenger charges may, if it be unreasonable in its terms, be held unconstitutional and void in its application to a particular case. But the Federal Supreme Court has held, as we shall see, that the determination of this question in a particular case does not conclude the question for all time as between parties standing in a different relation to the public authorities. This is well illustrated in the case of *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. That was a case in chancery, and the question of the reasonableness of the statute as applied to the complainant was determined upon a full review of all the facts of the case. It was held that the statute, as applied to these conditions, was unreasonable. But it is significant that in the very

case the court fully approve of the provision in the decree of the Circuit Court that the defendants, members of the board of transportation, might, "when the circumstances have changed so that the rates fixed in said act of 1893 [Acts Nebr. 1893, p. 164, chap. 24] shall yield to the said companies reasonable compensation for the services aforesaid," apply to the court by bill or otherwise, as they may be advised, for a further order in that behalf. If, then, it is possible that, as between the same parties who have litigated the reasonableness of a statute (or ordinance), the question may again be opened as a question of fact, how much more may it be said that, as between strangers to that litigation, the judgment depending upon a question of fact has not concluded them? In the case of *Brooklyn Crosstown R. Co. v. City of Brooklyn*, 37 Hun, 416, it was said:

"The validity of every ordinance or by-law of a corporation which is not passed in strict compliance with statutory delegation of power depends upon its reasonableness, * * * and hence that point [the reasonableness of the ordinance] was a proper subject for judicial examination as a question of fact."

If, then, there is involved in the case a question of fact, how shall that question be determined? As I have endeavored to show, the reason assigned by some of the authorities why it should not be a question for the jury is a wholly insufficient one. Worse than that, it is a false reason, which leads to erroneous and unjust results. We are not wanting, however, in authority which sustains the rule which I have foreshadowed. In *Clason v. City of Milwaukee*, 30 Wis. 316, it was said: "It is impossible for the court to determine whether or not the ordinance is reasonable and proper, in view of the object sought to be accomplished, without some evidence upon the subject. And we cannot see that it is a violation of any principle to submit these questions of fact to a jury as in other cases." This case was followed by the case of *City of Austin v. Cemetery Assn.*, 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114, in which it was held that it is incumbent upon a party who alleges the invalidity of an ordinance as unreasonable to aver and prove the facts which make it so; that, if the facts be controverted, they must be determined by the jury; but that

whether the facts relied upon show the ordinance to be unreasonable or not is a question for the court. So, in *State v. Boardman*, 93 Me. 73, 44 Atl. 118, 46 L. R. A. 750, it was said:

"It is true that the question of the reasonableness of a by-law is for the determination of the court, and this conclusion does not take away from the court the determination of the question. Certain facts will have to be passed upon by the jury. But the standard upon the question of the reasonableness or otherwise of the by-law is established by the court."

In *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176, the question of the reasonableness of a statute fixing the maximum rate at two cents per mile was involved. It was said:

"If the validity of such a law in its application to a particular company depends upon a question of fact as to its effect upon the earnings, may not the court properly leave that question to the jury, and decline to assume that the effect is as claimed. There can be but one answer to these questions."

The invalidity of the ordinance in the present case depended upon the ability of the defendant to establish certain facts. This it undertook to do. The case was tried without a jury. The trial judge, however, stood in the position of a jury. He found as a fact that the ordinance was not unreasonable. It was, then, within the province of the defendant's counsel to call for more specific finding of facts. This they failed to do. Doubtless better practice would have been to have had a specific finding upon the particular facts which are claimed to show the invalidity of the ordinance. But the record is not so made up. In my view, unless we are able to say that the testimony all tends in one direction, and that is to show the unreasonableness of the ordinance, the plaintiff in certiorari has not put itself in position to review the decision of the trial judge. As I do not find the testimony all one way, I think the judgment should be affirmed.

Chauvin v. Detroit United Railway Co.

(Michigan — Supreme Court.)

COLLISION WITH VEHICLE CROSSING TRACK; DUTY TO LOOK AND LISTEN.¹—

The plaintiff's team in crossing the track of the defendant was struck by a street car, one of the horses was killed and the plaintiff himself was injured. Before crossing the tracks he looked both ways and saw cars approaching on each track, one at a distance of about a block and the other at a distance of about two blocks. He looked a second time before driving upon the first track, but was struck by a car upon the second track as he drove upon it. It was held that the plaintiff was not guilty of contributory negligence as a matter of law in failing to look a second time before reaching the second track, and to endeavor to avoid the car on that track by stopping upon, or attempting to back from the first track.

ERROR brought by defendant from judgment for plaintiff. Decided November 17, 1903. Reported (Mich.), 97 N. E. 160.

Brennan, Donnelly & Van De Mark, for appellant.

Seth E. Engle, for appellee.

Opinion by *HOOVER*, C. J.

The plaintiff's team was struck by defendant's street car, and one of his horses was killed, and he was injured. The collision occurred about 7 o'clock in the evening of October 28th, after dark. The only question raised by this record is whether the court should have directed a verdict upon the ground of contributory negligence.

The plaintiff testified that he was driving upon Jefferson avenue, and had occasion to cross the double track of the railroad; that, before turning to cross, he looked both ways for the cars, and saw them both; that the one going from the city was ap-

1. The cases reported in this series relating to the duty to look and listen before crossing a street railway track are cited in the note to *Chicago City Ry. v. O'Donnell*, *ante*, p. 172. See also monographic note on "Duty to look and listen," 1 St. Ry. Rep. p. 667. As to contributory negligence in driving upon or across street railway tracks without looking or listening, see *Nellis Street Railroad Accident Law*, pp. 353-363.

proaching on the track next him, and was about one block distant; the one going toward the city was approaching him, and was about two blocks distant; that he turned to cross diagonally, but was struck by the latter. It is fairly inferable from his testimony that as he drove upon the tracks he looked again, first for the east-bound car, which was the nearer, and then for the west-bound car, when he saw that it was about to strike him, and the collision happened at once. There was evidence that the car was running very fast, and testimony tending to show that no effort was made to stop it. In deciding this question, the testimony most favorable to the plaintiff must be assumed to be true.

Defendant's counsel claim that it is conclusively shown that the plaintiff was negligent, because he drove upon the second track before looking a second time, and that, under the decisions of this court, one who does not look immediately before going upon a railroad track is negligent; citing *Doherty v. Railway Co.*, 118 Mich. 209, 76 N. W. 377, 80 N. W. 36; *Merritt v. Foote*, 128 Mich. 367, 87 N. W. 262; *McCarthy v. Railway Co.*, 120 Mich. 400, 79 N. W. 631; *McGee v. Railway Co.*, 102 Mich. 107, 60 N. W. 293, 26 L. R. A. 300, 47 Am. St. Rep. 507; *Borschall v. Railway Co.*, 115 Mich. 473, 73 N. W. 551; *Hine v. Railway Co.*, 115 Mich. 204, 73 N. W. 116. It is true that in some cases the negligence of a plaintiff has been clearly and conclusively shown. We think this is not such a case. The use of cars upon highways does not deprive persons of the right of walking and driving. They are constructed and operated upon the assumption that they will be driven upon and over, and that mutual care will be taken to avoid collisions. Necessarily the driving public must exercise some judgment in relation to the opportunity to cross tracks, especially in places where cars are always in sight; and, as we have intimated in another case, if one were to be always chargeable with negligence for driving upon a track when an approaching car was in sight, there are places where he could never cross the track without being negligent. When, in the exercise of common prudence, he may reasonably think there is time to cross safely, he is not chargeable with negligence. In this case two cars were in sight, one and two blocks away, respectively. Naturally he would look for the most danger from the nearer. Hence he may

have looked first for that, as he turned upon the track, and then for the other. It may be, as counsel seem to contend, that he should have looked soon enough to see where the car was, before driving upon the second track, and that he should have stopped upon, or attempted to back from, the first track, in the face of the approaching car upon the track. The sequel has proved that he could have done so, because that car was stopped before it got to him, but it would not ordinarily be a safe thing to do; and we have said in one or more cases that, where one finds himself unexpectedly in a place of danger, that fact bears upon the question of his negligence in what he does afterward, where he was not negligent in getting into the danger. If it is true that it was reasonable for him to believe he could cross safely, he was not negligent in attempting it. We cannot tell how much he had to fear from the nearer car, nor how much attention he felt it necessary to give to it. It was in the night, when the rate of speed of a car two blocks away may not have been easily determinable. Under these circumstances, we are not justified in saying that he was necessarily negligent in what he did. It was a proper question for the jury. The case is within the rule followed in the cases of *Garrity v. Railway Co.*, 112 Mich. 369, 70 N. W. 1018, 37 L. R. A. 529; *Ryan v. Railway Co.*, 123 Mich. 597, 82 N. W. 278; *Moran v. Railway Co.*, 124 Mich. 582, 83 N. W. 606; *Boettcher v. Railway Co.* (Mich.), 91 N. W. 125.

The judgment is affirmed. The other justices concurred.

Philip v. Heraty.

(Michigan — Supreme Court.)

1. INJURY CAUSED BY COLLISION OF STREET CAR WITH RAILROAD TRAIN AT CROSSING; DUTY TO STOP BEFORE CROSSING.¹— The plaintiff's intestate was a yard master in charge of a train of freight cars, which was being backed across street railway tracks. He was upon the first car which came in collision with the street car at the crossing, whereby

1. Right of way of steam railroad at crossing.— A steam railroad, by reason of the momentum of its trains and the necessities of railroad traffic, has the right of way and precedence at a highway crossing. Galena, etc.,

he was thrown from the car, run over and killed by his own train. There was testimony to the effect that the street car did not come to a full stop before an attempt was made to cross the track, as required by the statute (Mich. Comp. Laws, § 6464), and that the motorman did not make sure before crossing that no engine or cars were approaching, as therein required. It was held that the failure of the motorman to make sure that no engine or car was approaching was not negligence, regardless of the circumstances of such failure. It was held for the jury to determine whether the motorman took such measures as the circumstances required to ascertain whether a train was approaching.

2. ABSENCE OF WATCHMAN AT STEAM RAILROAD CROSSING.—Opinion evidence that it was negligent and unsafe to back a train across a street without flagging, in the absence of a watchman, is not conclusive upon the question of the contributory negligence of the decedent, and was properly left to the jury, with the testimony tending to show an exceptionally dangerous crossing. The negligence of the railroad company in not keeping a watchman at the crossing was not imputable to the decedent.

ERROR brought by defendants from judgment in favor of plaintiff. Decided January 12, 1904. Reported (Mich.), 97 N. W. 963.

T. A. E. & J. C. Weadock, for appellants.

Frank L. Edinborough (De Vere Hall, of counsel), for appellee.

Opinion by **HOOKE**, C. J.

The defendants were receivers of a street railway in Bay City, and were conducting its business at the time of the occurrence of the accident which is the subject of this action. The plaintiff is

R. Co. v. Dill, 22 Ill. 264; Toledo, etc., R. Co. v. Goddard, 23 Ind. 185; Black v. Burlington, etc., R. Co., 38 Iowa, 515; Warner v. N. Y., etc., R. Co., 44 N. Y. 465; Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329.

The same character or degree of care to avoid collisions must be exercised by those operating an electric car along a public highway, in crossing a steam railroad which has only the right to operate its road across the highway at grade, as is required from persons driving across it with ordinary vehicles, and they must look and listen for approaching trains, and stop, if necessary, and yield the right of way. N. Y. & G. L. R. Co. v. New Jersey Elec. R. Co., 60 N. J. L. 52, 37 Atl. 627, 38 L. R. A. 516. It is negligence to run a street car upon a railroad crossing without first stopping and looking and listening for trains, and the violation by a motorman of a city ordinance providing

the administratrix of one George Philip, deceased, and is alleged to be his widow. At the time of the accident George Philip was yardmaster for the Grand Trunk Railway, and was in charge of a train of thirteen freight cars which was being backed across the street railway tracks which were laid along William street. The deceased was upon the first car, with his lantern in hand, as the train was backed southward toward William street, which car came into collision with a street car upon defendant's road, whereby he was thrown from the car and run over and killed by his own train. At this point the street railway was crossed by two tracks belonging to the Grand Trunk Railway Company and one owned by the Michigan Central Railroad Company, and there is testimony in the record tending to show that the middle track, upon which deceased's train approached the crossing, was slightly lower than the others — perhaps two inches or thereabouts. The train was moving at the rate of four or five miles an hour, and the deceased was acting as lookout upon the end of the train. The street car was in charge of a conductor, and there was some testimony to the effect that he was upon the front platform of the car, with the motorman, when the collision occurred. Other testimony indicated that he was in the car, going to the rear platform, at that time. There is testimony that the street car did not come to a full stop before an attempt was made to cross the track. There is a dispute about this, however, and there is little doubt that its speed was checked. There is no claim that either the conductor or the motorman left the car and went to the track to see if it

that street cars shall come to a complete stop before going upon a railroad crossing is negligence. *Selma St. & Sub. Ry. Co. v. Owen*, 132 Ala. 420, 31 So. 598. A statute providing that no street car shall cross a railroad track at grade without first stopping, and that an employee of the company must go ahead to ascertain whether the way is clear, and that the car shall not cross until signaled so to do by the employee, applies to a railroad crossing having gates and a watchman. *Cincinnati St. Ry. Co. v. Murray*, 53 Ohio St. 570, 42 N. E. 596, 30 L. R. A. 508. But see *Richmond v. Railroad Co.*, 87 Mich. 374, 49 N. W. 621.

In the case of *Cincinnati St. Ry. Co. v. Murray*, *supra*, it was held that, notwithstanding a failure to comply with a statute requiring a street car to stop before passing over a railroad crossing, it must appear that the injury complained of was directly caused by the company's negligence.

would be safe to attempt to cross. And it is claimed by the defense that the testimony shows that it would have been unsafe for the motorman to have attempted to cross while the conductor was absent, for the reason that, owing to the nature of the particular crossing, the trolley was liable to slip off from the wire, and in such case the car would have been unable to proceed until the conductor should have returned and replaced it. It was also claimed that it would have been useless for the motorman to leave his car to see if the track was clear, for, had he done so, and found the track apparently clear, by the time he could have returned to the car, it would have been as dangerous to cross as in the first instance. The evidence showed that a flagman was kept at this crossing during the daytime by the Grand Trunk Company, but it was after his hours, and he was absent. It was also shown that the Michigan Central Company was in the habit of flagging its trains across this crossing, but that the Grand Trunk Company did not do so. The steam railroads were laid along Midland street, and at the corner of Williams and Midland there was a building that obstructed the view of the railroads to the west, and sometimes a car was left on the siding — *i. e.*, the first track — still further obstructing the view. There was a dispute as to whether such a car was there on this occasion. There was some dispute as to how far the motorman could see up the track, which depended somewhat on how near the track he ran his car before putting on the current to cross. After getting upon the track the motorman discovered the train, and reversed his motor, but did not succeed in quite clearing the car.

Counsel for defendants' most comprehensive point is that the court should have directed a verdict for the defendants for the reasons, first, that there was no testimony that there was any negligence in the management of the street car; second, that the undisputed testimony shows that the Grand Trunk Railway Company was negligent in not flagging its train across the street, by stopping it, and sending a man ahead of it, to see that the crossing was safe. We cannot say that there was no negligence on the part of the street car men. Aside from the statute (Comp. Laws, § 6464) which requires street railway companies "to require their drivers to bring their cars to a full stop, before going upon the

crossing of the tracks of a steam railroad, and make sure that no engine or cars are approaching, before they proceed to go upon the same," it was necessary for the crew of the street car, in this instance, to use reasonable care in approaching and crossing this track. We do not agree with the argument of the plaintiff that under this statute the failure of the motorman to make sure that no engine or car was approaching was negligence, whatever the circumstances attending his failure, and the court could not say that negligence was conclusively shown, for the reason that the fact of the collision shows that he could not have been sure that the crossing was safe. What the judge did was to leave it to the jury to determine whether the motorman took such measures as the circumstances required to ascertain whether a train was approaching, leaving to them the determination of what was done, as well as what was reasonably necessary to make sure, as required by law. There was no error in this, and defendants' point that a verdict should have been directed upon that ground was not well taken.

Upon the other ground the court instructed the jury:

"But, even though the employee of the defendant be negligent, in order for the administratrix to recover, the deceased himself, who was injured by the neglect, if there was neglect, on the part of the defendant, must also have been free from negligence; in other words, in the operation of his train, of which he had charge, it was his duty to comply with the rules and regulations under which he was acting, and to act with such care and caution as a prudent man would under like circumstances. In running his train down to cross the tracks he should run it with care, and with such method and system as would be best calculated to avoid accident. He must comply with the rules and regulations of his road, and the man must not be negligent and careless, and thereby contribute toward the accident and injury which followed. If he himself, as the law says, contributed to the injury or accident by fault or carelessness on his own part, that would prohibit his administratrix from recovering, because, where both parties contribute to an injury, the law leaves them both to suffer the consequences, whatever they may be, and neither one has a remedy against the other. But if he was handling his train in a cautious, careful, and approved manner, and with no violation of the rules of good judgment and care—such as should be exercised by him under the circumstances—then he would be free from negligence himself, and, if the defendant's agent's negligence brought about the accident, the defendant is liable."

Counsel offered the following request:

"If the Grand Trunk Railway Company was negligent in backing or pushing its cars across the track, at the time in question, without either stationing a flagman there, or leaving a man to flag the crossing for the cars in question, then plaintiff cannot recover."

The court gave this, but added to it the following qualification, viz.:

"If he had anything to do with or control over the matter, and he was negligent in the matter, there would be no recovery in this case."

Counsel claim that it was shown, and not contradicted, that the only safe way to operate a train across that street would be to bring it to a full stop and flag the crossing. If this were so, and it conclusively appeared that deceased had full control of and responsibility for the management of the train, as is stated in defendants' brief and the charge of the court, and not denied in plaintiff's brief so far as we can discover, such negligence would be his, and it is possible that a verdict should in such case have been directed. There was opinion evidence from several witnesses, not objected to, that it was negligent and unsafe to back the train across the street without flagging, in the absence of a watchman; but we think these opinions were not conclusive of the question, and were properly left to the jury, with the testimony tending to show an exceptionally dangerous crossing. *Freeman v. Railway Co.*, 74 Mich. 86, 41 N. W. 872, 3 L. R. A. 594.

The appellants' tenth request — *i. e.*:

"If you find that the accident was the result of concurring negligence upon the part of defendants and their employees, or either of them, upon one side, and upon the part of the Grand Trunk Railroad Company upon the other, then the plaintiff cannot recover in the action."

— was properly refused. If the Grand Trunk railroad was negligent in not keeping a watchman, such negligence is not imputable to the intestate. The only theory upon which it can be so contended is that by engaging in the operation of backing the train in the known absence of a watchman he assumed the risk. As between himself and his employer this may be true, but this

defendant has no rights growing out of such assumption of risk. If, however, it was negligent to omit the precaution of keeping a watchman, it was negligent to back the train across the street without flagging, and under the undisputed facts the deceased was in charge and control of the train, and such negligence (if it was negligence) was his, and, as the judge stated, would preclude a verdict for plaintiff.

The defendants' counsel claim that the plaintiff was not the lawful wife of the deceased, and offered to prove it by showing that he had a lawful wife living other than the plaintiff. This evidence was excluded. They also offered, but were not permitted to show, that he had children by such wife living. On the other hand, the plaintiff was allowed to testify that the intestate had made an arrangement with her whereby he had agreed to adopt two children of hers by her first husband. Comp. Laws, § 10,428, limits the recovery of damages to pecuniary injury to the persons entitled to distributive portions of the deceased's estate. To arrive at the amount of these it is necessary to know who such persons are, and how they have suffered. If the administratrix was not his widow, she was not entitled to a share of his estate; and the same is true of her children by her former husband, so far as appears by this record. It was, therefore, error to exclude the offered proof, and to admit the testimony about the alleged agreement to adopt her children.

The mortality tables are ordinarily admissible in such cases, as we have frequently held, and were in this case, if there was any foundation for their admission.

Error is assigned upon the argument of counsel, which is alleged to have been intemperate and unfair. We think it open to such criticism. A defendant has a right to have a dispassionate consideration of the questions in this case.

The judgment is reversed, and a new trial ordered.

The other justices concurred.

Houghton County Street Railway Co. v. Common Council of Village of Laurium.

(Michigan — Supreme Court.)

1. **STREET RAILWAY FRANCHISE; RIGHT TO CONNECT SUBURBAN LINES.**— A franchise granted the relator authorized it to construct a street railway in a certain county through the streets of certain named villages. Such franchise was considered and held to authorize the company to make a necessary connection on a street of one of the villages named with a branch line built through one of the other villages.
2. **FAILURE TO CONSTRUCT WITHIN PRESCRIBED TIME.**— Where the railway was constructed within the limits of a village before the expiration of the time prescribed in the franchise the company may construct a line connecting its lines within such village with a branch line after the expiration of such period.

CERTIORARI brought by relator to review an order denying a writ of mandamus. Decided February 16, 1904. Reported (Mich.), 98 N. W. 393.

Statement of facts by GRANT, J.

The relator was organized in 1900, for the purpose of constructing lines of street railway in the county of Houghton. Its articles of association read:

"We, the undersigned, having associated ourselves together to organize a street railway for the purpose of constructing, owning, maintaining and using a street railway in the county of Houghton, from the easterly boundary of the village of Houghton, in said county, thence through the streets of said village of Houghton, across Portage Lake in said county, thence to the village of Hancock in said county, and along its streets, thence to the villages of Laurium and Red Jacket, across the townships of Quincy, Franklin, Osceola and Calumet, and along and through the streets of said villages of Laurium and Red Jacket, and to the county of Keweenaw, in the vicinity of the Allouez mine, in said last-named county, and from the village of Laurium aforesaid to the village of Lake Linden, in said county, and through the streets of said last-named village, thence through the townships of Schoolcraft and Torch Lake, and through said townships of Osceola, Quincy, and Franklin, in the county of Houghton aforesaid, to the village of Houghton in said county, and desiring to become incorporated for that purpose, under the provisions of chapter 168, Comp. Laws 1897," etc.

"Art. 2. The purpose for which this corporation is formed is to construct, own, maintain and use, a street railway in the villages and townships above mentioned, in the county of Houghton, in said state, upon the line and over the streets and highways in said villages and townships above men-

tioned, and when constructed to equip the same with passenger cars, to be propelled by electricity, under the system generally known as the overhead trolley system."

"Art. 5. The operations of this corporation are to be carried on in the county of Houghton, state of Michigan."

Its main line runs from Houghton, through Hancock, Laurium, and Calumet, to Red Jacket. It asked and obtained a franchise from the respondent, the material parts of which are as follows:

"Section 1. That permission and authority be and hereby is granted to and vested in the Houghton County Street Railway Company, a corporation duly organized, its successors and assigns, to hereafter construct, maintain and operate a double track electric railway, with all necessary tracks, side tracks and switches, poles and wires upon and along the following streets of said village, namely: Commencing on Calumet street at the extreme southwesterly corner of the limits of the village of Laurium; thence running easterly on and through Calumet street to Lake Linden avenue; thence north on and through Lake Linden avenue to Hecla street; thence northeasterly on and through Hecla street to First street; thence westerly on and through First street to Conglomerate street; thence northeasterly on and through Conglomerate street to the limits of the village of Laurium; and, also, if desired, on Seventh and Florida streets."

Section 2 requires the company to commence the work of construction of said railway within the village of Laurium on or before July 1, 1900, and also requires that the same shall be completed and in full operation along said streets on or before July 1, 1901.

"Sec. 3. Cars shall be run daily upon such street railway, and so far as practicable, shall be run at regular intervals, and said company, for itself, its successors and assigns, in accepting this ordinance, agrees that the cars from any terminus of the line or line [this evidently should read "lines"] of its railway without the limits of said village of Laurium shall run at regular intervals to said village of Laurium without change or transfer, and also that in the running of its cars and its rates of fares, no discrimination shall be exercised between said village of Laurium and any other city or village."

Section 4 provides for the construction under the supervision and direction of the common council.

Section 5 provides for the form, material, and manner of construction.

All the conditions were complied with by the relator, and a single track was constructed instead of a double track, and was in full operation by July 1, 1900. A branch line was subsequently constructed, running from a point about halfway between the villages of Laurium and Red Jacket to the Wolverine Mining Company's location, where there is a considerable population. Calumet street is the street between the villages of Laurium and Florida, the center line of the street being the boundary line between the two villages. Early in 1903 the relator constructed a line from Lake Linden, situated upon Torch lake, and reaching Calumet street, at the extreme

southwestern part of the village, where the population and buildings are sparse. The length of this line is six and one-half miles. It approaches Calumet street upon Hancock street, in the village of Florida. There is no street in Laurium opposite Hancock street. The Lake Linden line approaches the main line in Laurium at right angles, running north and south, and between the end of it at the boundary line and the south rail of the railway on Calumet street, in Laurium, is a space of about eleven feet. About six feet of this distance, including the embankments, is now occupied by the line on Calumet street in Laurium; so that in fact there is only a distance of about five feet not now used by the relator, to be occupied by making the connection with its main line at this point.

The relator, claiming the right to make the connection with these two lines under its franchise from the respondent, but admitting the right of the respondent under the franchise to prescribe the material, manner, etc., of construction, applied to the common council for leave to make this connection, setting forth its plans and specifications, requesting its approval, and, if they should not be approved, that the council then direct what reasonable changes or alterations should be made. The respondent refused either to approve or direct changes, except upon the imposition of conditions not covered by the franchise above stated. Relator then applied to the Circuit Court for the county of Houghton for the writ of mandamus to compel the council to act as requested. That court denied the writ, and the case is now before us for review on certiorari.

It is deemed important to state the location of the municipalities of Houghton county. The principal centers of population are as follows: The villages of Houghton and Hancock, situated on opposite sides of Portage lake, and containing a population of about 8,000 people; the villages of Calumet and Red Jacket are about twelve miles from Hancock, in a northeasterly direction, and contain a population of about 35,000. At or near these places are located the great mines of the Calumet & Hecla, Tamarack, and Osceola. Lake Linden lies in a southerly direction from Calumet, Red Jacket, and Laurium. At Lake Linden are situated the stamp mill and smelting works of the Calumet & Hecla, and near them, on the shore of the the stamp mills of the Tamarack, Osceola, and Quincy mines. The population at Lake Linden and vicinity is about 6,500. Other mining locations are accommodated by the various lines of the relator's road.

Gray & Stone, for relator.

William R. Oates (Kerr & Petermann, for counsel), for respondent.

Opinion by GRANT, J.

The sole question presented is, has the relator the right, under the franchise, to connect the two lines at the place designated?

Counsel agree that franchises of this character are to be strictly construed. When, however, the intention of the parties is clear, that intention will be given effect. What the parties, expressly or by necessary implication, contract to give or to do, they must be compelled to give or to do. The purpose of the company was to construct a street railway running through and accommodating all the centers of population within the county of Houghton. The projected road was to run along past the mining locations of the copper range whose stamp mills are mostly located at, and in the vicinity of, Lake Linden, and where also are the smelting works of the Calumet & Hecla. The business of these mining companies was carried on at the mines and at the mills. Obviously the travel between them would be considerable. The articles of incorporation were specific, and mentioned three lines as part of the system, viz., that from Houghton to Red Jacket, that from Laurium to Lake Linden, and thence to Houghton, and the one to the Allouez mine. The respondent knew the situation and the provisions of the articles of incorporation, and clearly contracted with reference thereto.

While its so-called main line was that running from Houghton to Red Jacket, the other two lines were as much a part of its road as the so-called main line. It was apparently as much to the benefit of the village of Laurium and the traveling public to have an unbroken connection with Lake Linden and vicinity as to have it with Houghton and Hancock. That the parties contracted in reference to these lines is apparent from the language of section 3, by which, for the accommodation of its own inhabitants and all travelers to and from Laurium, the franchise required the company to run cars from any terminus of the line or lines of its road without the limits of said village at regular intervals to said village, and without change or transfer, and without any discrimination between said village of Laurium and any other city or village. No such language would have been used if but one line had been contemplated running between Houghton and Red Jacket. One of the things which the relator unequivocally contracted to do was to connect all the lines of its road so that cars should run from any terminus outside the village along its track or tracks within the village without change or transfer. This

was obviously for the accommodation of the inhabitants of the village of Laurium and travelers thereto. If the relator contracted to do this, the respondent certainly contracted to give it the right to do it. No place was fixed for this union of the Lake Linden line with the other lines. It follows that the parties contemplated and contracted for a union at a place convenient both to the relator and to the inhabitants of Laurium and those having occasion to travel over the road to Laurium. It is apparently conceded that the relator has constructed its Lake Linden line for the convenience of the public and of itself. It is virtually conceded upon this record that the point of union is a proper, convenient, and necessary one. No claim is made by the respondent that the company either ought or could have constructed its road so as to make connections outside the village of Laurium. It is a fair inference from the record that the Lake Linden line was contemplated as finally constructed. It runs through the village of Florida, and naturally the understanding was that it should be built to accommodate the people of that village as well as those of Laurium.

Let us reverse the proposition: If the relator, having constructed its road to Calumet street at the point designated, had refused, upon the request of the authorities of the village of Laurium, to connect this line with the other line at that point, would not its refusal have been in violation of its contract? A contract, to be binding, must be mutual, and what the relator contracted to do the respondent by the same instrument contracted to give it the right to do. By the ordinance (section 3) the relator contracted to run all its cars without change to the village of Laurium. "To" means within, not up to. It was not a compliance with the terms of the contract for the relator to construct its road up to the boundary line of the village. It is, therefore, clear that the franchise granted to the relator the right to connect the Lake Linden line with the other line at some convenient and proper place, and was not limited to a connection outside the village of Laurium. If the Lake Linden line had been constructed within a year, probably no question would have arisen as to the right to connect the two.

The only other question is, is that right lost or forfeited by the failure to construct the Lake Linden line within the time fixed for

the construction of the road through the village of Laurium? If this contention prevail, it follows that the company has lost all right to construct a double track because two tracks were not constructed within the time. The ordinance, under the authorities, gave the right to construct a second track whenever the necessities and business of the company required. *Burlington v. Burlington Street Ry. Co.*, 49 Iowa, 144, 31 Am. Rep. 145; *Ransom v. Citizens' Street Ry. Co.*, 104 Mo. 375, 16 S. W. 416. See also *Citizens' Street Ry. Co. v. Board of Public Works of Detroit*, 126 Mich. 554, 85 N. W. 1072.

The occupation of about five feet of the street in the manner and at the place designated creates no additional burden upon the street. The connection is clearly for the accommodation of the inhabitants of Laurium, and as well all travelers over the road, and is in accordance with the terms of the franchise. The right to make the connection has not been forfeited by the failure to construct the Lake Linden line before July 1, 1901. Besides, the road was constructed along the designated streets in the village of Laurium within the time provided. The right to connect with other lines was not limited as to time.

Judgment reversed, and judgment entered in this court for the relator.

MOORE, C. J., and MONTGOMERY and HOOKER, JJ., concurred.

Dissenting opinion of CARPENTER, J.

Relator proposes to lay a track in respondent's street to connect its line in said village with a branch line running to Lake Linden. Is the right to build this track granted by relator's franchise? The granting part of that franchise is contained in section 1, which reads as follows: "That permission and authority be and hereby is granted to and vested in the Houghton County Street Railway Company * * * to hereafter construct, maintain and operate a double track electric railway, with all necessary tracks, side tracks and switches, poles and wires, upon and along the following streets of said village, viz.: Commencing on Calumet street, at the extreme southwesterly corner of the limits of the village of Laurium, thence running easterly on and through Calumet street to Lake Linden avenue, thence [and here follows an enumeration of streets, not material to the case]."

I think it clear that the right to construct the proposed track is not granted in this section. It surely is not a track "upon and along" Calumet street. Neither is it a side track or switch necessary to the operation of said track.

Is the right to construct the proposed track granted by section 3 of said franchise? Said section, so far as material to the question under consideration, reads: "And said company, for itself, its successors and assigns, in accepting this ordinance, agrees that the cars from any terminus of the line or lines of its railway without the limits of said village of Laurium shall run at regular intervals to said village of Laurium, without change or transfer."

This provision, and, indeed, all the provisions of this section, impose obligations upon the grantee of the franchise. It is not the section in which we would naturally expect to find a grant to the relator. Nevertheless, I think it should be presumed that relator was granted everything necessary to enable it to perform the obligations imposed upon it by respondent. It is insisted that under this rule there passed to relator a grant to construct in the streets of respondent village a track to connect its Lake Linden branch with its line on Calumet street. To this proposition I cannot assent. Relator did not agree to construct its Lake Linden line to Laurium. At most, it agreed that the cars on said line should run to Laurium. We cannot infer that when the franchise in question was granted the route of the line from Laurium to Lake Linden was determined. Where the two lines would be connected was, therefore, not known, either to relator or to respondent. It is obvious that the point of connection would be subsequently determined by relator. In making that determination relator was not, in my judgment, bound by the contract with respondent to select a place convenient to the inhabitants of Laurium and those having occasion to travel over the road. The obligation of relator to run its cars over the Lake Linden branch into Laurium did not affect the right of relator to determine the point of connection of its two lines. If relator had chosen, as it might, to make this connection outside the village of Laurium, it could have run the cars on the Lake Linden line into the village, as it agreed, without laying any other track. We cannot say, therefore, that the right to lay the track in question is necessarily implied by the obligation of relator to run its cars from this line into the village of respondent; and it is well settled, in the construction of grants of this character, that nothing passes unless it is expressly granted or necessarily implied. See *Coolidge v. Williams*, 4 Mass. 140; *Charles River Bridge v. Warren Bridge*, 11 Pet. at p. 547, 9 L. ed. 773, 938; *Grant v. Leach*, 20 La. Ann. 329, 96 Am. Dec. 403; *Sprague v. Birdsall*, 2 Cow. 419; *Cooley Const. Lim.* (6th ed.) 486, 487.

It is true that the relator's proposed track in the respondent village is very short, and perhaps it may not seriously damage the street; but, in my judgment, it is a clear invasion of respondent's rights, and should not be permitted. If relator can build this track to permit a connection at this point, I am unable to see any reason why it should not select the point of connection to suit its convenience, and build whatever tracks are necessary to effect a juncture there. Indeed, it is stated in relator's brief: "We might well argue from these cases [cases which I think are clearly distinguishable from the one under consideration] that this very section of the ordinance

gives the relator the right to run its Lake Linden branch to some convenient point within the village of Laurium, even using some of the streets of the village, if necessary, to reach such point; but we do not, of course, take that position." An argument leading to such a conclusion is, in my judgment, unsound. Even if we construe the franchise liberally to the grantee — and it should be construed strictly against it (see *Street Ry. Co. v. Detroit*, 110 Mich. at p. 394, 68 N. W. 304, 35 L. R. A. 859, 64 Am. St. Rep. 350), no such grant could, in my judgment, be implied.

I cannot agree to the proposition that "the record shows that the point of union (of the two lines) is a proper, convenient, and necessary one," and that "the Lake Linden line was contemplated as finally constructed." By its petition relator claimed the right, under the ordinance in question, to connect said Lake Linden line with its line on Calumet street by building a side track or switch. Respondent denied this right, averring that "the construction of a branch railway from Lake Linden, entering said village of Laurium, and connecting with said relator's main line in said village, was in no way contemplated or authorized by any ordinance enacted by respondent." Respondent's denial is as broad as relator's claim. In my judgment, there is nothing in relator's petition to suggest that the point of connection was a necessary one, or that the Lake Linden line was contemplated as finally constructed. As relator did not plant its case on this ground, the failure of respondent to deny it is of no significance.

This question is asked: "If relator, having constructed its road to Calumet street at the point designated, had refused, upon the request of the authorities of the village of Laurium, to connect this line with the other line at this point, would not its refusal have been in violation of its contract?" I answer "yes," and I also say that if respondent insists upon this connection it must permit relator to make it. I also say that, if relator's Lake Linden branch had been constructed to some point at respondent village so remote from its line in that village that it could only reach the same by laying a mile of track in a street not designated in its franchise, respondent could have insisted upon the connection being made, and would have been obliged to permit the laying of the track necessary to effect it. I apprehend that this would be true, even if relator had expressly promised to make connection without laying additional track in respondent's street. The right of relator to lay the track in these supposed cases arises, not from its original contract, but from relator's undertaking a particular method of performing that contract, and respondent's insistence upon the execution of that method. In the case at bar respondent objects to the execution of that method of performance, and the question before us is whether it ever granted relator the right to perform its contract by that method. In my judgment, we cannot say from the record before us that it did, and, therefore, the application for mandamus was properly denied by the trial court.

I think that relator is not entitled to the mandamus, and that the decision of the court below should be affirmed.

Detroit United Railway v. Board of State Tax Commissioners.

(Michigan — Supreme Court.)

1. **TAXATION OF REAL PROPERTY OF STREET RAILWAY COMPANY;¹ MUNICIPAL TAX ON GROSS EARNINGS; FIXTURES.**—A municipal ordinance providing for the payment to a city of a percentage of the gross earnings of a street railway company and further providing that such company shall pay the city such taxes for municipal purposes as shall be levied or assessed upon the lots and parcels of lands and buildings thereon which are the property of the company, should not be construed so as to exclude from the assessment-rolls for taxation for municipal purposes the machinery used by the company in the operation of its railway by electrical power. Such machinery constitutes fixtures within the meaning of a statute providing that for the purpose of taxation, real property shall include all lands within the State and all buildings and fixtures thereof and appurtenances thereto. (Comp. Laws, § 385.)
2. **POWER OF STATE BOARD OF TAX COMMISSIONERS.**—The provisions of a municipal charter for the taxation of real and personal property within the city, and that the city assessors shall make copies of the rolls as finally confirmed by the city council, on which they should ratably assess county and State taxes as provided by general law, do not prevent the State from enacting a law requiring the revision of local assessments by a State board of tax commissioners.

APPLICATION for a writ of mandamus to compel the board of State tax commissioners to set aside an order made by them in respect to the assessment of the relator's lands and buildings. Decided March 23, 1904. Reported (Mich.), 98 N. W. 997.

Brennan, Donnelly & Van De Mark, C. D. Joslyn, and John J. Speed, for relator.

Timothy E. Tarsney, for respondents.

Opinion by MOORE, C. J.

This is an application for a writ of mandamus to compel the board of State tax commissioners to set aside an order made by them increasing the assessed valuation of relator's lands and build-

Other cases reported in this series relating to the taxation of street railways are: *San Francisco & S. M. Elec. Ry. Co. v. Scott*, 2 St. Ry. Rep. 36, (Cal.) 75 Pac. 575; *City of Philadelphia v. Electric Traction Co.*, 2 St. Ry. Rep. 862, (Pa.) 57 Atl. 354; *City Council of Marion v. Cedar Rapids, etc., Ry. Co.*, 1 St. Ry. Rep. 192, (Iowa) 94 N. W. 501; *People ex rel.*

ings in the city of Detroit, and to order the assessors of the city of Detroit not to extend a tax against the lands and buildings of relator for the year 1903 according to such increased valuation. It is claimed in the petition that, by virtue of certain ordinances referred to therein, the machinery used by relator in the operation of its lines of railway by electrical power cannot be placed upon the assessment-rolls for taxation for municipal purposes, and that it has not heretofore been assessed. The respondents filed an answer to the petition, in which, among other things, the following is stated:

"These respondents deny 'that by the terms of said agreement the machinery used by your petitioner and its predecessors in the operation of its lines of railway by electrical power cannot be placed upon the assessment-rolls of the city of Detroit for taxation for municipal purposes,' and aver that said machinery is properly assessed and assessable as a part and portion of the land and buildings owned and occupied by said relators, and to which said land and buildings said machinery is affixed in a permanent manner; that said ordinances referred to and set out in said relator's petition, nor any of them, did not and could not have included said machinery as a part of the personal property of said relator or its predecessors, for the reason that, at the time of the adoption of said several ordinances referred to therein, the entire system originally known as the Detroit City Railway, the system known as the Ft. Wayne & Elmwood Railway, and the system known as the Grand River Street Railway were conducted and operated by animal power, and so continued to be operated up to and including some portion of the year 1893, and in some instances to a later period; that during the year 1893, and thereafter, said several lines of street railway were entirely reconstructed, rails of greater weight were substituted and laid in place of the lighter ones upon which the horse cars were operated, electricity was introduced as a motive power, power plants for the purpose of making and supplying electricity by the said several companies, and ponderous mechanical machinery, including engines, boilers, dynamos, and other appliances for the production of electricity, were installed, and said engines, boilers, dynamos, and other machinery were firmly and permanently affixed to the lands and premises of said railway companies, with the intent and design of said several companies, and the officers and managers thereof, at the time of the installation thereof, that said machinery should be and remain a permanent fixture annexed to the lands of the said several companies,

Brooklyn Rapid Transit Co. v. Miller, 1 St. Ry. Rep. 565, 85 App. Div. (N. Y.) 178, 83 N. Y. Supp. 96; City of Philadelphia v. Philadelphia Traction Co., 1 St. Ry. Rep. 717, (Pa.) 55 Atl. 762; Merrill Ry. & L. Co. v. City of Merrill, 1 St. Ry. Rep. 844, (Wis.) 96 N. W. 686.

and the buildings thereon, and that there has been no actual or constructive severance thereof since said time of installation; and that the same has remained, and now is, a part and parcel of the real estate to which they are affixed, and should be, and is, properly assessed as such. * * * And further answering, say that the machinery now treated as real estate is only such as is permanently affixed to the lands and premises, and which cannot be removed therefrom without injury thereto, and which, as hereinbefore stated, it was the intent and design of the said railway companies to be affixed thereto, and to remain a part thereof permanently; that there is a large quantity of appliances which may properly be designated machinery, such as electric motors, etc., which is not included in said assessment as real estate, but is treated as a part of the personal property of said relator, and valued as such. * * * They deny that the said increased assessment was made up solely of the value of said machinery used in connection with the power-houses as therein stated, but state that the increase on lot 8 and part of lot 9 from \$62,920 to \$382,400 was not only upon the machinery affixed thereto, but upon the valuation of the buildings thereon; and they aver that said machinery is in law and in fact a part of the real estate, and that the same is so constructed and installed that it cannot readily be removed without in any way injuring the land or the buildings thereon; and they aver that while it is true, as stated in said paragraph, that said petitioner has removed in the past parts of said machinery from one power-house to another, they deny that it was done without affecting in any way the value of the premises or the buildings thereon; that the power-house of the Ft. Wayne & Elmwood [the Ft. Wayne & Belle Isle] Railway was located on Clark avenue when said system was a separate entity, but that, when the Detroit Citizens' Railway Company acquired the same, said power house was dismantled and the machinery transferred to another place, and that such removal so affected the value of the real estate and premises upon which said machinery was located on Clark avenue that the board of assessors of the city of Detroit took notice thereof, and reduced the assessment thereof for that reason. And they aver that said machinery so treated as real estate was intended by said Detroit Citizens' Street Railway Company to be a part and parcel of the real estate, and that the same is a part of the lots and parcels of land and buildings thereon, within the scope, effect, and meaning of the ordinances referred to and set forth in said relator's petition. * * * These respondents, the board of State tax commissioners, deny the allegations contained in the fourteenth paragraph of said relator's petition as therein stated, and aver that they did take into consideration the valuation placed upon the personal property of said relator, and considered and determined that the valuation placed thereon, after deducting the value of said machinery transferred to the real estate assessment, was not too high, and that the valuation of the personal property of said relator, excluding said machinery now remaining on said assessment-roll, is, in the opinion of these respondents, a fair and just valuation of the said relator's personal property."

Upon the filing of the answer, this court directed the taking of testimony before a special commissioner, and that testimony is before us.

The ordinance under which the relator is operating provides for the payment to the city of Detroit of a percentage upon its gross earnings. It also has these provisions:

"Sec. 2. From the 1st day of July, 1882, to the end of its franchise, under the ordinance approved November 14, 1879, the said railway shall also pay the city of Detroit such taxes for municipal purposes as have been up to this date and shall be hereafter levied or assessed upon the lots and parcels of land and buildings thereon which are the property of the said railway. Such taxes shall be levied or assessed in the same manner and shall be payable at the same time as other city taxes on lands."

"Sec. 4. The above-mentioned percentage payments and the tax on lands provided for, to accrue from January 1, 1887, to the end of the franchise of said railway, are to be paid by said railway and received by the city in lieu of and in discharge of all taxes, license fees and charges of any kind against the property, capital stock, rights and franchises of said company which have been or may be levied, assessed or imposed under any present or future law or authority."

The general tax law in force when the ordinance was adopted, and in force now, has the following among other provisions: "For the purpose of taxation, real property shall include all lands within the State and all buildings and fixtures thereon and appurtenances thereto, except in cases otherwise expressly provided by law." Comp. Laws, § 3825.

It is said by counsel that this court has recognized land may be taxable, wholly distinct from the buildings thereon, and wholly distinct from the buildings and fixtures, or from either one of the two (citing *Le Fevre v. Mayor of Detroit*, 2 Mich. 586), and that applying this principle to the language used in the ordinance requiring the relator to pay taxes for municipal purposes "upon the lots and parcels of land and buildings thereon which are the property of the said railway" indicates an intention between the city and the relator, which should be respected, to exempt the fixtures from taxation. We do not draw the same conclusion from *Le Fevre v. Mayor*, *supra*, reached by counsel. In that case it was held that a statute providing all houses of public worship should be exempt from taxation did not exempt the land from the payment of a paving tax. At the time the ordinance was granted, the

motive power employed for running the cars was horses. The fixtures attached to the barns and other buildings owned by the company would be of little value. There is nothing in the ordinance, when viewed in the light of the surrounding circumstances which existed when it was passed, indicating the city and the company expected that fixtures attached to the buildings owned by the company would be exempt from taxation.

The relator insists the increase in the assessed valuation of the real estate was brought about by adding thereto machinery which was personal property, and not properly taxable as real estate. It is contended the boilers used in the generation of steam, the engines used to drive the dynamos, the dynamos used to generate electricity, the batteries used for storing it, the boosters, the switchboards, and other machinery, are none of them real estate; citing several cases, and among them *Illuminating Co. v. Assessors*, 19 R. I. 632, 36 Atl. 426, 36 L. R. A. 266, which is said to be a parallel case. In the power-house, at the top of the iron columns which support the roof, there is a projection which allows laying thereon an iron beam on each side of the building, and running lengthwise of it. These two beams or girders are technically called "I beams," and may be said to form a wide railway track—that is, a track as wide as the building—upon which is operated what is called a "crane." This crane may be said to be a sort of a car, whose wheels run upon the tracks I have just described. This car has blocks and tackle and other appliances for lifting and holding heavy machinery. These blocks and tackle, by means of pulleys, are moved from side to side as may be found necessary, to be brought immediately over any piece of machinery to be removed. The tackle and hoisting apparatus is then fastened to the piece of machinery, which is then lifted up and carried across the building by the crane or car to the doorway out of which it is taken. This was put in to facilitate the handling of the machinery, and it is said that, as the machinery can be taken out without injury to the building, it is personal property. The boilers occupy a space of twenty-five or thirty feet square, and are sixteen or eighteen feet high. They are suspended upon boiler frames set upon piers built up from the concrete floor, and are inclosed with a brick wall twelve to fourteen inches thick upon three

sides, the front of the inclosure being of iron. Some of the engines develop 1,200 horse-power, are thirty feet long, twenty to twenty-eight feet wide, with fly-wheels that weigh twenty tons each. The engines, dynamos, and other machinery are large and heavy; some of them, in addition to their weight, being held in place by bolts. We have examined the cases cited by counsel. In *Illuminating Co. v. Assessors, supra*, it appears the statute of Rhode Island differs from ours in relation to assessments. Under the construction given to it by the courts, it is held that dynamos removable at pleasure, by simply unscrewing bolts, and without doing injury to the freehold, come under the provisions of section 11, which provides that "machines of all sorts propelled by steam or water power" should be classed as personal property for purposes of taxation. Pub. Stat. 1882, chap. 42. Our statute has no such provisions. It was also held that switchboards that can readily be removed without injury to the real estate come within the provisions of the same section.

Mr. Dupont, a witness for the relator, superintended the construction of the power-house, and caused the machinery to be put in. On the cross-examination, in addition to other testimony, he said: "Q. You did intend that machinery that you put in there — engine and boiler, generators, and other appliances — should continue to be used to produce power for the system that you operated, so long as it lasted, or until new appliances were discovered to take its place? A. Yes; which would produce power cheaper. Q. With the exception of that limit, it was intended to be permanent? A. Certainly; yes." The relator was then the owner of the land and the buildings, and put into them this ponderous machinery, with the intention that it should remain, as stated by Mr. Dupont. Without going into details, we are satisfied that, as to the most of this machinery, it was properly assessable as real estate. See *Wickes Bros. v. Hill*, 115 Mich. 333, 73 N. W. 375; *People v. Jones*, 120 Mich. 283, 79 N. W. 177.

It is suggested that, when this machinery was put in, it was expected that in time it would be supplanted by improved machinery, and provisions were made to make it practicable to remove it, and for that reason it is not to be regarded as real estate. We do not see how this differs in principle from the expectation

that any manufacturer has to replace his machinery when it has outworn its usefulness, either because it is worn out, or because of improvements made, making new machinery indispensable if he is to compete with manufacturers who do use the improved machinery.

The respondents return "that the machinery now treated as real estate is only such as is permanently affixed to the lands and premises, and which cannot be removed therefrom without injury thereto, and which, as hereinbefore stated, it was the intent and design of the said railway companies to be affixed thereto, and to remain a part thereof permanently; that there is a large quantity of appliances which may properly be designated machinery, such as electric motors, etc., which is not included in said assessment as real estate, but is treated as a part of the personal property of said relator, and valued as such." We are not able to say from the record that this return is not true.

It is said (and we quote from brief of counsel):

"The city charter of Detroit provides for a board of city assessors, and makes it their duty to assess 'all the real and personal property subject to taxation by the laws of the State.' § 163, Compilation of 1893 (Local Acts 1883, p. 619, No. 326, § 2). By an amendment of the charter approved June 6, 1901 (Local Acts 1901, p. 708, No. 472), it was enacted that the assessment-roll shall be completed on the 1st of April. Provisions are made for a review by the common council and for confirmation of the rolls, 'and after due consideration thereof, said rolls shall be fully and finally confirmed by said council and shall remain as the basis of all taxes to be levied and collected in the city of Detroit according to the property valuation until another assessment shall have been made and confirmed as above provided.' These provisions, it will be understood, relate to assessments for city taxes. By the same amendment last referred to, after confirmation of the assessment-rolls, the assessors are required to extend upon the rolls the amount of money which the common council, with the consent of the board of estimates, has ordered to be raised for the next fiscal year for city purposes, and these provisions contemplate that the tax-rolls will be in the hands of the receiver on or before July 1st, when the fiscal year begins. 'All city taxes become a debt against the owner from the time of the listing of property for assessment by the board of assessors.' * * * The State may use local agencies for State purposes, and, in the matter of assessment and collection of taxes, the Legislature may provide for the assessment and collection of general taxes by local officers, or by officers selected by the State, and, if the State may by its own officers assess property and collect its taxes thereon, it may review the rolls made by the local officers; the power to revise or review

involving the power to make the roll in the first instance. But while the State may use and confer upon local officers functions for State purposes, it is not equally true that the Legislature may authorize State officers to perform duties merely for local purposes. The mayor of a city may for certain purposes exercise powers of a State officer, but the State cannot, on the plea that a mayor is authorized to exercise powers in which the State is interested, appoint the mayor of a city, nor authorize a State officer to perform the duties of the mayor. The State cannot select the assessors of Detroit merely because their assessment may be made the basis for State taxation. There is a general theory that it is the duty of the State to see to it that the local government is maintained, and, this being the duty of the State, it may appoint its own officers to see that it—including the assessment of taxes—is performed. This duty may authorize the State by proper means to compel local officers to perform their duties—exercising the discretion and the powers conferred by law—but the difference between compelling the local officer to perform a duty and the performance of the duty by a State officer is manifest. The carrying of the theory to its limits would result in the absorption by the State of all the functions of the local government and its officers. * * * The State is not concerned in the making of the assessment for merely local purposes further than it may be interested in the enforcement of the law of the land, and in respect to which it may resort, not to its own officers, but only to the courts. The State, as to purely local taxation, has no more authority to interfere with the assessment through State officers than it has to collect the money, or pay it out after collection. The copy of the roll prepared for the levying of the State and county tax, up to the time of the equalization of the State and county assessments, may be reviewed by a State official; and, it being the duty of the city assessors to make a copy of their roll for State and county taxes as soon as the city roll is completed, that copy, I submit, becomes and is the only State and county assessment-roll, and I submit that the authority of the State board to review should be confined to this State and county roll."

In this connection the following provision of the charter is important: "It shall be the duty of the board of assessors to make copies of said rolls as finally confirmed by the common council, upon which they shall ratably assess the county and State taxes as provided by the general laws of the State." (§ 3 as amended.) The question presented is not a new one in this State. It was directly involved in the recent case of *Tax Commissioners v. Assessors*, 124 Mich. 491, 83 N. W. 209, where there is so full a discussion of the principles involved that we do not deem it necessary to attempt to restate them here. See also *Tax Commissioners v. Quinn*, 125 Mich. 128, 84 N. W. 1.

The writ of mandamus is denied. The other justices concurred.

Other Cases Decided in Supreme Court of Michigan.

1. INJURY TO BICYCLE RIDER; RUNNING CAR NORTH ON WESTERLY TRACK.—

In the case of *Baldwin v. Heraty*, (Mich.) 98 N. W. 739, it appeared that the plaintiff's intestate was riding a bicycle upon the tracks of the defendant. Hearing a car approaching from the rear he assumed that it was upon the easterly track, and without looking behind he turned upon the westerly track, upon which the car was running to the north, and was struck by the car and killed. The court said: "This was contributory negligence, unless he had a right to rely upon the practice as an invariable one. It was customary, and probably necessary, for the car to go north on the west track for a certain distance, and some cars did so regularly, and it was not negligence on the defendant's part to so run this car. Plaintiff's proof shows that it was customary for north-bound cars to go upon the easterly track, but it was not sufficient to show such uniformity of practice as to justify the decedent in taking it for granted that this car was upon the east track, and disregarding the duty of turning his head to see whether he was safe when he heard the bell. The court might properly have said to the jury that the deceased was guilty of contributory negligence."

2. INJURY TO PASSENGER BY SUDDEN STARTING OF CAR WHILE ALIGHTING.—

In the case of *Hastings v. Boland*, (Mich.) 98 N. W. 1017, it appeared that the plaintiff, a passenger on the defendant's street car, suffered a broken ankle and other injuries from a fall when alighting from the car. The negligence relied on is alleged to have consisted of a sudden starting of the car after it had stopped, and while the plaintiff was in the act of alighting, whereby he was thrown down upon the pavement or crossing. The court in affirming a judgment for the plaintiff used the following language:

"The allegations of error relied on are few. Plaintiff's theory was that the car stopped, and when plaintiff was in the act of alighting it started up again with a sudden jerk. There was also a count based upon the slowing down of the car, and an acceleration of speed by a jerk, before it came to a stop. Defendant's counsel requested the court to charge that: 'The so-called 'jerking' of the car makes no difference in the result of this case. If the car started at any rate of speed while the plaintiff was alighting, after the car had stopped, and the accident had been because of such starting, the defendant would be liable; but, if it did not stop, it would not help the plaintiff's case that the car started suddenly and with a jerk.' The court did not give this request in exact terms, but he said: 'Now, I charge you that under the evidence in this case the plaintiff cannot recover upon the latter theory, viz., that the power was applied, and the car started up and he thrown from the platform or step, before the car had stopped.' A claim is made that this did not sufficiently protect the defendant against the danger of

the argument, that the car started up with a 'sudden jerk;' but we think there was no danger of a failure of the jury to understand that there could be no recovery unless the car stopped, and was started up again, before plaintiff alighted.

"The court was asked to instruct the jury that: 'The sole question for you to determine is the truth of Mr. Hastings' story. If you are not satisfied that this is substantially correct, there is no other testimony in the case upon which your verdict could be based in favor of the plaintiff; and in this connection neither sympathy nor prejudice should be permitted to sway your minds, but you should determine the truth of the matter by weighing the evidence, and the testimony of disinterested witnesses should not be lightly thrown aside.' This form of request cannot be approved, for it involves the dangerous consequences of a difference of opinion regarding the testimony of the witness named. The court pointed out what was necessary to be proven to justify a verdict, which was the proper method of charging the jury.

"A motion was made for a new trial upon the ground that the verdict was against the evidence, and error is assigned upon its denial. We think it was not so clearly against the weight of evidence as to justify a reversal upon that ground."

Ries v. St. Louis Transit Co.

(Missouri — Supreme Court, Division No. 1.)

COLLISION WITH PEDESTRIAN CAUSING DEATH; CONTRIBUTORY NEGLIGENCE.¹—

The plaintiff's intestate while crossing one of the tracks of the defendant was struck by one of its cars. It appeared that the decedent before going upon the track could have seen and heard the approaching car, but did not look, listen, or pay any attention whatever to it. It was held that he was guilty of contributory negligence precluding recovery; that his negligence was not only concurrent with that of the defendant's motorman, but contemporaneous and coincident with his injury, and that there was no room in the case for the interposition of the humanitarian doctrine.

As to duty to look and listen before crossing street railway tracks, see note to *Chicago City Ry. v. O'Donnell*, 2 St. Ry. Rep. 172, where many cases are cited, including all of those reported in this series. See also monographic note, 1 St. Ry. Rep. 667.

APPEAL by plaintiff from judgment for defendant. Decided November 25, 1903. Reported 179 Mo. 1, 77 S. W. 734.

A. R. Taylor and *A. L. Hirsch*, for appellant.

Boyle, Priest & Lehmann and *Geo. W. Easley*, for respondent.

Opinion by *BRACE*, P. J.

This is an action for the recovery of damages for the death of Joseph Ries, husband of the plaintiff, which it is alleged was caused by the negligence of the defendant in operating one of its cars going north on Seventh street. The petition charges that said Ries was on the 30th of March, A. D. 1900, struck, run over, and killed by said car through the negligence of the defendant's servant or agent in charge of the operation of said car, "in this: that he failed to sound the gong or bell upon said car, or to warn said Joseph Ries of its approach, or to stop said car, or to operate the fender of said car so as not to run over him, but instead of so doing carelessly and negligently caused and suffered said car to run upon and over him, thereby causing his death; that said car was at the time, or immediately before it struck said Joseph Ries as aforesaid, running at an unlawful rate of speed; that said defendant was negligent, in that the track was in defective condition, and it carelessly permitted it to remain so." The answer was a general denial and a plea of contributory negligence. No evidence was introduced tending to prove that the track was in a defective condition, that the car was running at an unlawful rate of speed, or that the fender was not operated properly. In support of the other allegations of negligence, two witnesses (*Lizzie Reiter* and *Theresa Laubersheimer*) who claimed to have seen the accident and one witness (*H. C. Montgomery*) who testified as to the distance within which a car could be stopped at the place of the accident were introduced. At the conclusion of the plaintiff's evidence the defendant demurred thereto. The demurrer was sustained. The plaintiff took a nonsuit with leave, in due time filed motion to set the same aside, which being overruled, the plaintiff appealed.

The errors assigned for reversal are the sustaining the demurrer to the evidence, the refusal of the court to permit the witnesses *Reiter* and *Laubersheimer* to express an opinion as to

how far the motorman could have seen ahead, and to permit these witnesses to straighten out their testimony and clear the confusion caused by their not understanding the questions put by counsel for defendants. As to the two last assignments, it is only necessary to say that these witnesses not only testified that the motorman could see the deceased, but to all the physical facts necessary to determine how far he could have seen him, and were permitted to make all the corrections they desired in their testimony. The only basis for this last assignment is that the court would not permit counsel to go with them again over the same ground that they had already been over three or four times. The only real question in the case is whether the court committed error in sustaining the demurrer to the evidence. The accident happened at the intersection of Seventh and Pestalozzi streets, in the city of St. Louis, on March 30, 1900, about twenty minutes after 8 o'clock, P. M. Seventh street runs north and south, and Pestalozzi street east and west, crossing each other at right angles. The defendant street railway is located on Seventh street. It is a double-track railway, the cars running north on the east track and south on the west track. The deceased was struck and killed by one of defendant's cars running north on the east track, on or near the north crosswalk leading across Seventh street from the northwest to the northeast corner of said streets. The circumstances of the accident must be gleaned as well as may be from the vague, confused, inconsistent, and unsatisfactory evidence of the two witnesses aforesaid, who claim that they witnessed it. The substance of their testimony seems to be about as follows: That on the night and at the hour aforesaid they were walking on the east side of Seventh street south toward Pestalozzi street; that when they got within the distance of four houses, or about eighty feet, from the northeast corner of these streets, they saw the car approaching from the south, a short distance south of the south crosswalk, and at the same time saw deceased coming out of a saloon on the northwest corner, and going to the north crosswalk over Seventh street. In the next view of the car and the deceased that we get in this evidence the deceased, having passed over the pavement from the saloon to the north crosswalk, over the space between the curb and the west track, over the space between the rails of that track, is seen standing on the crosswalk in the space between the

west and east track, looking back to the west, and whistling to his little dog, which was on the pavement in front of the saloon; and the car, in the meantime having passed over the south crosswalk and some distance over the space between the two crosswalks, is seen approaching, and near the north crosswalk. There is no evidence tending to prove that while he was in this position he was in any danger from the approaching car. In the next and last view given by these witnesses the deceased is seen moving from his last position on the crosswalk between the tracks toward the east track, and in doing so is struck by the fender of the car. It further appears from the evidence of these witnesses that the headlight on the dashboard in front of the car was shining brightly; that they heard no bell rung, gong sounded, or other warning given as the car approached the north crosswalk; the motorman was looking west, and they saw no effort made to stop the car before the deceased was struck; that although it was a dark night, and there were no street lights in that locality, yet there was light enough from the headlight and from the lights in neighboring stores and houses for them to see what transpired, and their evidence tended to prove that the motorman could have seen the deceased, and the deceased could both have seen and heard the car, at any time after the deceased entered upon the crosswalk. The evidence of the only other witness for the plaintiff tended to prove that the car going at the rate of eight miles an hour could have been stopped at that place, with the reverse, in about thirty, and with the brake in about forty-five feet.

The demurrer to the evidence was properly sustained. While the evidence for the plaintiff tended to prove that the defendant's motorman was negligent in failing to give proper warning and to keep a proper lookout on approaching the crosswalk, it also showed at the same time that the deceased, at any time after he came out of the saloon, could have both seen and heard the approaching car, and yet, without looking or listening or paying any attention whatever to the approaching car, he attempted to cross its track in front of the car, and by it was immediately struck and killed, in the attempt. His death was the immediate result of his own negligence, to which the negligence of the defendant's servants could have been no more than contributory. His negligence was not only concurrent with that of the defendant's servant, but

cotemporaneous and coincident with his injury, and there is no room in the case for the interposition of the humanitarian doctrine invoked. The motorman was under no obligation to stop his car while the deceased was standing in a place of safety between the tracks with his back to the track on which the car was moving, whistling up his dog; and the motorman could not have stopped it in the time that intervened between the time when he left that position and the time when he was struck.

The judgment of the Circuit Court is affirmed. All concur.

Peck v. St. Louis Transit Co.

(Missouri—Supreme Court, Division No. 1.)

1. **INJURY TO PASSENGER ALIGHTING; BURDEN OF PROOF.**—The plaintiff was injured in attempting to alight from one of the cars of the defendant. An instruction to the effect that the burden of proof as to the act of negligence complained of rests upon the plaintiff throughout the case is not objectionable because it fails to distinguish between the act of negligence stated in the petition and the contributory negligence charged in the answer, where there was in fact no suggestion in the case of contributory negligence.
2. **INSTRUCTION AS TO STOPPING CAR.**—An instruction to the effect that if the jury find from the evidence that the plaintiff's injuries were caused by her leaving the car before it had "stopped still," and while the same was in motion, and that but for such attempt on her part to alight from the car while the same was in motion, she would not have sustained any injury, then the plaintiff cannot recover, is not objectionable where the plaintiff alleges in her petition and her evidence tends to show, and her requests for instructions assume that the car had stopped when she attempted to alight therefrom and was injured.

APPEAL by plaintiff from judgment for defendant. Decided November 25, 1903. Reported 178 Mo. 617, 77 S. W. 736.

Gilliam & Smith, for appellant.

Geo. W. Easley and Boyle, Priest & Lehmann, for respondent.

Opinion by VALLIANT, J.

Plaintiff was a passenger on one of defendant's street cars, and in attempting to alight therefrom fell in the street and received

injuries. She said in her petition that the car had stopped for the purpose of allowing her to alight, and that while she was in the act of alighting the defendant carelessly and negligently suddenly started said car, throwing her to the ground in a violent manner. That is the only act of negligence charged. The answer was a general denial and a plea of contributory negligence. The evidence for the plaintiff tended to sustain the allegations of her petition; that for the defendant tended to prove that the car had not stopped, but was slowing down to stop, and that the plaintiff attempted to step off facing the rear while the car was still moving, and in doing so fell. At the request of the plaintiff the court instructed the jury that if the car was stopped, in compliance with her signal, to enable her to alight, and if while she was in the act of stepping from the car it suddenly started forward, and she was thereby thrown to the ground, and if by the exercise of a very high degree of care the defendant's servants could have prevented the car from so starting, and if she was herself exercising ordinary care in so attempting to alight, she was entitled to recover; and, further, that, if the car came to a stop to allow her to alight, it was the duty of the conductor to have held it stationary until she had alighted, if by the exercise of a very high degree of care he could have done so. For the defendant the court gave the following instructions:

"(1) The actionable negligence charged in plaintiff's petition is that the conductor of defendant's car, upon which plaintiff was a passenger, caused the car to stop on the south side of Laclede avenue, on Grand, for the purpose of permitting plaintiff to alight therefrom, and that while plaintiff was in the act of alighting the defendant carelessly and negligently suddenly started said car, whereby plaintiff was thrown to the street and injured. The burden of proof as to the act of negligence charged as above rests upon the plaintiff throughout the case, and, before you are entitled to return a verdict in favor of plaintiff, you must find by the preponderance or greater weight of the evidence that the plaintiff's injuries were caused by the act of negligence on the part of defendant, as above stated, and unless you so find your verdict must be for the defendant. (2) If you find from the evidence that the plaintiff's injuries, if any she sustained, were caused by her leaving the defendant's car before it had stopped still on the south side of Laclede avenue, and while the same was in motion, and that but for such attempt on her part to alight from said car while the same was in motion she would not have sustained any injury, then the plaintiff cannot recover, and your verdict must be for the defendant. (3) If the jury believe

from the evidence that the plaintiff got off of the car when it was about to stop to permit passengers to alight, but while it was yet moving, then there is no evidence of negligence on the part of defendant, and the verdict must be for the defendant."

There was a verdict and judgment for defendant, and the plaintiff appeals.

The only action of the court assigned for error is the giving for the defendant the three instructions above copied. The complaint of the first instruction is, first, that it gives undue prominence to the fact of the stopping of the car, and treating it as a part of the act of negligence; and, second, that it throws the burden of proof in the whole case on the plaintiff, without distinguishing between the act of negligence stated in the petition and the contributory negligence charged in the answer.

An instruction undertaking to inform the jury as to the act of negligence which formed the gravamen of the plaintiff's case could not have been correctly framed without stating it substantially as it was stated in this instruction. Whilst the stopping of the car and the plaintiff's attempting to alight were not acts of negligence, yet they constituted the condition which rendered the starting of the car an act of negligence according to the petition. The instruction merely stated the act of negligence as plaintiff had stated it in the petition and in the instruction asked by her, and in the only way it could be intelligently stated to conform to the plaintiff's theory.

As to the burden of proof, the instruction only related to the act of negligence charged in the petition. Certainly, the burden of proving that act was on the plaintiff, and that is as far as the instruction goes. There was no reference to a condition of facts from which the jury were asked to find the plaintiff guilty of contributory negligence. There was in fact no suggestion of contributory negligence in the case as it was given to the jury. The defendant merely took the position in its proof and in its instructions that the defendant did not commit the particular act charged to have been committed, and that the accident did not happen as the plaintiff said it did. In a case where a passenger is injured because of the breaking down of a car, or the breaking of some appliance or equipment, where the breaking and the injury to

the passenger, as resulting therefrom, are shown, a *prima facie* case is made, and the burden is shifted to the carrier to show that it was without his fault. Plaintiff in the case before us invokes that doctrine, but this case does not fall within it. We see no fault with the first instruction for defendant.

The complaint of the second and third instructions is that they limit the inquiry of the jury strictly to the letter of the plaintiff's petition, and say, in effect, that unless the car had stopped when the plaintiff was in the act of alighting the charge of negligence was not proven, and the verdict should be for the defendant. Appellant complains of the term "stopped still." If the defendant had a right to use the word "stopped" in reference to the condition of the car, it was not an abuse of the right to say "stopped still." There is really no difference in the meaning in that connection between "stopped" and "stopped still," except that perhaps the latter is more emphatic. In this respect, however, the writer of the defendant's instructions was not more emphatic than the writer of the plaintiff's instructions, who said in the second instruction for the plaintiff, "If the jury believe from the evidence that the car upon which the plaintiff was a passenger came to a stop, * * * then it was the duty of the conductor to have held the car stationary until she alighted." The serious complaint, however, against these two instructions is that they require the jury to find that the car had actually stopped when the plaintiff was stepping off, and prohibited the finding of a verdict for the plaintiff in case the jury should believe that the car had slowed down in its motion to such a degree that the plaintiff might, without passing the bounds of ordinary prudence, have attempted to alight, and that while doing so a quick motion was suddenly imparted to the car, which threw her down. The learned counsel seek to bring the case within the doctrine announced in *Ridenhour v. Railway Co.*, 102 Mo. 270, 13 S. W. 889, 14 S. W. 760. The plaintiff in that case was a boy nine years old. The petition stated that on his signal the car stopped to allow him to alight, and that while he was in the act of alighting it was suddenly put in motion, and thereby he was thrown to the street and injured. In that respect the case was like this. The evidence for the plaintiff in that case was that, as the car approached the street at which

the plaintiff wished to get off, he told the conductor that he wanted to get off there. The conductor rang the bell to stop. The car "just slacked up" and the boy attempted to get off, but just as he had one foot off the car gave a sudden jerk, and he was thrown down. The evidence for the defendant (which was that of the conductor) was to the effect that the boy was not on the train at all, and the conductor did not know that one had been hurt by his train until informed of it afterward. Under that state of the pleadings and evidence this court held that the giving of the following instruction was not error: "If the jury find from the evidence that plaintiff was a passenger on defendant's cars, that the agents and servants of defendant in charge of said car knew at what point plaintiff desired to alight, and that when they reached said point said agents and servants of defendant did not stop a sufficient length of time to permit the plaintiff, acting with reasonable care and diligence for one of his years, to alight in safety from said cars, and that by reason thereof the plaintiff, in attempting to alight, was thrown from said car and injured, then he is entitled to recover." In passing on that case this court held that the statement in the petition that the car stopped to allow the plaintiff to alight was a matter of inducement; that the act of negligence charged was putting the car in motion while the plaintiff was in the act of leaving. Whatever may be said as to a variance between the *allegata* and the *probata* in that case, certain it is that, aside from the petition, the plaintiff's evidence and instructions brought it within principles which this court has recognized, namely, that it is not negligence *per se* for a passenger to attempt to board a car or alight from it while it is moving slowly; that whether, under the circumstances of the given case, it is negligence so to do, is a question for the jury; and that if, while the passenger is attempting to alight when the car is moving so slowly that he cannot be deemed guilty of negligence in so attempting, the motion of the car is suddenly so increased as to cause him to fall, the carrier is liable. The following cases, cited in the brief of the learned counsel for appellant, sustain that doctrine: *Doss v. Railroad Co.*, 59 Mo. 27, 21 Am. Rep. 371; *Wyatt v. Railroad Co.*, 62 Mo. 408; *Kelly v. Railroad Co.*, 70 Mo. 604; *Straus v. Railroad Co.*, 75 Mo. 185; *Leslie v. Railroad Co.*, 88 Mo. 50;

Burger v. Railroad Co., 112 Mo. 238, 20 S. W. 439, 34 Am. St. Rep. 379. But has this plaintiff, either by her pleadings, her proof, or her instructions, given this defendant any such case to answer as that presented in *Ridenhour v. Railway Co.*, above mentioned, or in any of the other cases cited? In her petition she said that the car had stopped; in her evidence she stated the same thing, and in her instructions she founded her right to recover on that condition. The court, in its instructions, both for the plaintiff and the defendant, followed the line the plaintiff had marked out. If there was any error, the plaintiff induced it. No such theory as she now presents was offered for the consideration of the trial court during the trial.

The plaintiff now insists that, although all of her evidence conformed to the letter of her petition, and all of her instructions were based on her evidence, yet, because the defendant's witnesses stated that the car had slowed down, she was entitled to have had submitted to the jury the question of whether, under the circumstances as detailed by the defendant's witnesses, she was not exercising ordinary care in attempting to alight from the moving car. If it be conceded that she was entitled to have had that question submitted to the jury, she has no right to complain of the court for not submitting it, because she did not ask it. And she has no right to complain of the instructions given at the request of the defendant, because they were in effect only the plaintiff's instructions turned around so as to show the other side on the same theory.

There is nothing in this record that the appellant has a right to complain of, and, therefore, the judgment is affirmed. All concur.

Jett v. Central Electric Railway Co.

(Missouri — Supreme Court, Division No. 1.)

INJURY TO CHILDREN WALKING ON TRACK; CONTRIBUTORY NEGLIGENCE; DUTY OF MOTORMAN TO STOP.¹—The plaintiff's child, while walking with her brother along and upon the tracks of the defendant, was struck by one of its cars and killed. The evidence tended to show that the motorman

1. Other cases reported in this series pertaining to the negligence of street railway companies in causing injuries to children upon tracks are: *North Chicago St. Ry. Co. v. Johnson*, 2 St. Ry. Rep. 82, (Ill.) 68 N. E. 463;

could have seen the children upon the track for a distance of more than 400 feet, and by the exercise of ordinary care could have avoided the accident. It was held that notwithstanding the negligence of the children and the right of the motorman to presume in the first instance that they would look for the car and get out of the way, the failure of the motorman to use ordinary care to prevent the injury is negligence for which the company is liable. The question as to whether under the circumstances the motorman exercised due care to prevent the accident is one of fact for the jury.

APPEAL by defendant from judgment for plaintiff. Decided November 25, 1903. Reported 178 Mo. 664, 77 S. W. 738.

John H. Lucas, for appellant.

Andrew R. Lyon and Scarritt, Griffith & Jones, for respondents.

Opinion by VALLIANT, J.

Plaintiff's minor child was run over and killed by a street car of the defendant, as they allege, through the negligence of the defendant's servants operating the car. The negligence charged

Mellen v. Old Colony St. Ry. Co., 2 St. Ry. Rep. 427, (Mass.) 68 N. E. 679; *Meeker v. Metropolitan St. Ry. Co.*, 2 St. Ry. Rep. 536, (Mo.) 77 S. W. 58; *Kube v. St. Louis Transit Co.*, 2 St. Ry. Rep. 597, (Mo. App.) 78 S. W. 55; *Fritsch v. N. Y. & Queens Co. Ry. Co.*, 2 St. Ry. Rep. 789, 93 App. Div. (N. Y.) 554, 87 N. Y. Supp. 942; *McDonald v. Metropolitan St. Ry. Co.*, 2 St. Ry. Rep. 788, 93 App. Div. (N. Y.) 238, 87 N. Y. Supp. 699; *Sciurba v. Metropolitan St. Ry. Co.*, 2 St. Ry. Rep. 789, 87 App. Div. (N. Y.) 614, 84 N. Y. Supp. 85; *Carney v. Concord St. Ry.*, 2 St. Ry. Rep. 668, (N. H.) 57 Atl. 218; *Forrestal v. Milwaukee Elec. Ry. & L. Co.*, 2 St. Ry. Rep. 968, (Wis.) 97 N. W. 182; *Zimmerman v. Denver Cons. Tram. Co.*, 1 St. Ry. Rep. 21, (Colo.) 72 Pac. 807; *McDermott v. Boston Elev. Ry. Co.*, 1 St. Ry. Rep. 325, (Mass.) 68 N. E. 34; *Campbell v. St. Louis & Sub. Ry. Co.*, 1 St. Ry. Rep. 475, (Mo.) 75 S. W. 86; *Lafferty v. Third Ave. R. Co.*, 1 St. Ry. Rep. 605, 85 App. Div. (N. Y.) 592, 83 N. Y. Supp. 405.

Greater vigilance and caution are to be exercised by motormen to prevent injuries by collision with children than the law demands for the protection of adults. *Nellis Street Railroad Accident Law*, p. 327. See also *Passamaneck v. Louisville R. Co.*, 98 Ky. 195, 30 S. W. 620; *Woeckner v. Erie Elec. Motor Co.*, 176 Pa. St. 451, 35 Atl. 182 (where a motorman was held negligent in entirely releasing the brake on his car on a down grade after bringing it almost to a stop, while a child under four years of age is within ten feet of the car and five feet of the track, although the child had turned

in the petition was the running of the car at a greater rate of speed than twelve miles an hour, in violation of a city ordinance, and in running the car at a high rate of speed against and over the child while she was walking along the track, without giving any warning of its approach, and without exercising reasonable care to

away from the track); *San Antonio St. R. Co. v. Mechler*, 87 Tex. 628, 30 S. W. 899, 5 Am. Electl. Cas. 585. In the case last cited the court said: "There is no reason why a street car company should be charged with any higher degree of diligence to ascertain the presence of a child upon the track than an adult. The greater diligence required in case of the small child arises out of the known want of capacity to take care of itself, and this duty cannot be imposed until the character of the person imperiled is known. But when it is known that a young child is approaching the track, with the apparent intention of crossing it in front of a moving car, or if it be discovered upon the track, the highest degree of diligence must be exercised to prevent injuring it."

A motorman cannot assume that a child seven years of age, hurrying toward a track, and looking in the opposite direction, will not go on the track in front of the car. *Citizens' St. R. Co. v. Hamer*, 29 Ind. App. 426, 62 N. E. 658. And in the case of *South Chicago City Ry. Co. v. Kinnare*, 96 Ill. App. 210, it was held that the presumption that a person who is seen upon the track or near to it, and is apparently capable of taking care of himself, will leave the track before a car reaches him, sufficient warning having been given him of its approach, is not to be applied to children who are too young to appreciate their danger.

Application of rule as to duty to look and listen.—While as a general rule it is the duty of a pedestrian to look and listen before attempting to cross a street car track, and a failure to do so will bar a recovery, the rule is not to be applied inflexibly in all cases without regard to age or circumstances. If we assume that it can be asserted as a proposition of law that a child is *sui juris*, so as to be chargeable with negligence, the law is not so unreasonable or unjust as to require of it the same degree of reason and consideration in avoiding the consequence of the negligence of others that is required of persons of full age and capacity; and it should be left to the jury to determine whether a child, in attempting to pass in front of a car, acted with that degree of care and prudence which might reasonably be expected, under the circumstances, of a child of his age and capacity. It is for the jury to determine whether a child's conduct, in attempting to cross a track in front of an approaching car without looking or listening, is characterized by any want of that degree of care which could reasonably have been expected of a child of his age. *Wallace v. City & Sub. Ry. Co.*, 26 Oreg. 174, 37 Pac. 477, 5 Am. Electl. Cas. 554. See also *Stone v. Dry Dock, etc., R. Co.*, 115 N. Y. 104, 21 N. E. 712; *Byrne v. N. Y., etc., R. Co.*, 83 N. Y. 620; *Goldstein v. Dry Dock, etc., R. Co.*, 35 Misc. Rep. (N. Y.) 200, 71 N. Y. Supp. 477.

avoid striking her after the servants in charge of the car saw that she was in a position of danger, or would have seen it if they had exercised ordinary care. The answer was a general denial and a plea of contributory negligence. There are some undisputed facts in the case. They are as follows: St. John avenue is a public street in Kansas City running east and west. Jackson street, running north and south, crosses it at right angles. Elmwood avenue, which is parallel with and east of Jackson street, also crosses St. John avenue at right angles. The distance from Jackson street to Elmwood avenue is half a mile, and there is no other street crossing St. John avenue between those two. St. John avenue is the only open thoroughfare running east and west through a section about a mile wide, and it is, therefore, a much used highway for people living in that part of the city. The defendant maintains a double-track street railroad along the center of St. John avenue. Between Jackson street and Elmwood avenue, St. John avenue is not paved or sidewalked, except a sidewalk in front of the plaintiffs' premises, and except that along the center of the street, a space sixteen feet wide, in which are laid the defendant's tracks, there is a surface of broken stone and granite. In consequence of the otherwise unpaved condition of the street, the travel both for vehicles and pedestrians is along that sixteen-foot space, particularly so in wet weather when the street is muddy. People usually walked in the railroad tracks because it was better walking than on the street outside, and the children going to school took that course. The plaintiffs' residence is on a lot that fronts fifty feet on the north line of St. John avenue. From the west line of plaintiffs' lot to the east line of Jackson street is 208 feet. Farther to the east is the residence of Mr. Owen. From his house to Jackson street it is 660 feet. Elmwood avenue is still to the east of Mr. Owen's house. On the morning of February 6, 1900, plaintiffs' two children, a girl aged eleven years, ten and one-half months, and a boy about two years younger, on their way to school, were on the north track of defendant, when a car of defendant going in the same direction approached behind them, and struck the girl and killed her. In addition to the above undisputed facts there were other facts about which there was conflict in the evidence; the testimony for the plaintiffs tending to show that the

facts were one way, that for the defendant another. If the facts were as the plaintiffs' testimony tended to prove they were, the plaintiffs were entitled to recover; but, if the facts were proved to be as the evidence relied upon by the defendant tended to prove, then the verdict should have been for the defendant. The verdict was for the plaintiffs for \$5,000, and judgment accordingly, from which the defendant appeals.

1. The question in the case, in our judgment, is one of fact. The principles of law governing it are well settled, and there is little, if any, real difference in that respect between the learned counsel. Appellant contends that the testimony shows that these two children were walking on the north side of the north track at a safe distance therefrom as the car approached behind them, and when it had reached within ten or fifteen feet of them, they appeared by their movements suddenly to design crossing the track, and, as if with that purpose, did step on the track within that distance of the car when it was going at its usual speed; that the motorman immediately saw the movement of the children, and did everything within his power to stop the car, but it was impossible to do so. The boy escaped with a scratch, but the girl was crushed beneath the car. There was evidence tending to prove that these were the facts, and the jury were instructed that, if they found those to be the facts, their verdict should be for the defendant. But there was testimony upon which the plaintiffs rely which tended to prove the following facts: These children came out of the gate in front of their father's house, walked straight to the north track, and went upon it. The boy undertook to walk on top of the north rail, and was doing so, his sister walking in the track, and holding his hand to assist him in accomplishing his feat; that they continued to walk in that way until the car was upon them. The boy jumped to the right, and barely escaped, but the girl was caught. These children, then on the track, were in plain view of the motorman, if he had been looking, from the time he reached Mr. Owen's house until he struck them. When the car struck the child it dragged her under its wheels fifty or sixty feet, and stopped twenty-five feet each of Jackson street, the point where she was struck; therefore, was seventy-five or eighty-five feet east of Jackson street. According to this testimony,

the point where the children went upon the track — that is, on a straight line from the gate in front of their father's house — was 233 feet east of the east line of Jackson street. They walked, therefore, on the track 148 or 158 feet before the car struck them. One of the witnesses, a school girl thirteen years old, who lived east of Mr. Owen's house, was walking west on the south track, and saw these children when they came out of their gate walking toward the track. She waved to them, and thought to overtake them. Just after that, as she came opposite Mr. Owen's house, this car passed her. Then she stepped behind it on the north track, and continued to walk west in that track. The car shut off her view of the children, and she saw them no more until after the accident. The evidence was also to the effect that the gong was not sounded, and that the children had no warning of the approach of the car; also that the motorman did not have his hands on the appliances for controlling the car, but was leaning against the car, and conversing with the conductor; also that the car was running unusually fast. If the jury believed the evidence tending to prove those facts, they were bound to find a verdict for the plaintiffs, even though they also believed that the children were guilty of negligence in walking on the track. The motorman, if he was looking, saw the children at least from the time he passed Mr. Owen's house, which was over 400 feet east of the point at which they went upon the track, so that he ran more than 500 feet with the children in view before he struck them. Of course, the children would have seen the car approaching them if they had looked in that direction, and it was negligence in them not to have looked. And the motorman had a right to presume, in the first instance, that they had looked or would look, and that, seeing the car coming, they would get out of the way. But it was his duty to be on the constant watch, and, in the event it became evident that they were not observing the care they should observe, it became his duty to avoid running upon them if by ordinary care, with the means in his power, he could do so. Whether it must have become evident to the motorman in this case, presuming he was on the lookout, that these children were heedless of the approaching car, and negligently unmindful of their danger, was a question for the jury. If they believed from the evidence that a

reasonable man in the motorman's place, on the watch, and mindful that he was running a dangerous machine, would have seen that these two children were so absorbed in the little exploit the boy was trying to accomplish — balancing himself to walk on the rail with the assistance of his sister holding his hand — and that they were apparently oblivious to the approaching danger, then the jury had the right to say that the motorman knew, or that, if he had exercised ordinary care, he would have known, the danger in time to have averted the accident, and, failing to do so, the defendant is liable.

We do not attach any importance to the fact that the plaintiffs' testimony tended to show that the car was running faster than twelve miles an hour, in violation of the city ordinance. Twelve miles an hour, under the circumstances of this case, would have been as effective of the result as a greater speed. Assuming that he was going only twelve miles an hour, if the plaintiffs' evidence is believed, the motorman saw the peril of the child in time to have averted the accident, but without making any effort to do so — without even sounding his gong — he ran upon them. The general rule of law that a plaintiff cannot recover damages for injuries sustained by him when his own negligence has contributed with that of the defendant to cause the injuries has one exception, and that is if the defendant, before the injury is inflicted, discovers the peril (or in some cases even where, by the exercise of ordinary care, the defendant might have discovered it), and has it in his power then and there, by the exercise of ordinary care, to avert the injury, but fails to do so, he is liable. That is the law in this State, so declared in *Kellny v. Railway Co.*, 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783, and iterated in *Morgan v. Wabash Ry. Co.*, 159 Mo. 262, 60 S. W. 195. The facts which the plaintiffs' testimony tends to prove bring this case within that exception, and for that reason the court did not err in refusing the instruction asked by the defendant in the nature of a demurrer to the evidence.

There is one other ground assigned by appellant why the demurrer to the evidence should have been sustained; that is, that there was no evidence to prove that the deceased was unmarried. It is true the record shows no evidence offered on that point, but

it would be so improbable that a child not quite twelve years old, living with its parents, and going to school from their home, was married, that we should presume the contrary in the absence of any suggestion to the trial court that proof on that point was desired.

The criticisms of the action of the court in the giving and refusing of instructions are all based on separate features of the same proposition, which is appellant's main assignment of error; that is, that there was no evidence to sustain the plaintiffs' case, and an instruction for a nonsuit should have been given. We have already discussed that proposition.

We find no error in the record, and the judgment is, therefore, affirmed. All concur.

Warner v. St. Louis & Meramec River Railroad Co.

(Missouri — Supreme Court, Division No. 1.)

1. **EXCESSIVE SPEED; NEGLIGENCE.**¹—Negligence is not shown by evidence that the car when a collision occurred was running at the usual rate of speed, though faster than at other places in the city.
2. **SOUNDING GONG OR WARNING.**—Where the evidence shows that the motor-man of the car causing the injury sounded the gong at a distance of 1,000 feet from the place where the accident occurred, and again sharply three times at a point 160 feet distant from such place, the charge of negligence for failure to give proper warning of the approach of the car is not sustained.

1. **Negligent rate of speed.**—See *South Covington & C. St. Ry. Co. v. Constans*, 1 St. Ry. Rep. 242, and note, 25 Ky. Law Rep. 158, 74 S. W. 705; *State v. United Rys. & Elec. Co.*, 1 St. Ry. Rep. 260, and note, (Md.) 54 Atl. 612; *Moore v. Lindel Ry. Co.*, 1 St. Ry. Rep. 492, (Mo.) 75 S. W. 672, and note on 1 St. Ry. Rep. 493, relating to the effect of ordinances regulating the rate of speed of street cars; *Lane v. Brooklyn Hts. R. Co.*, 1 St. Ry. Rep. 586, and note on page 587, 85 App. Div. (N. Y.) 85, 82 N. Y. Supp. 1057. As to excessive rate of speed causing injury to passenger, see note to *Fisher v. Union Ry. Co.*, 1 St. Ry. Rep. 636. Where there is no law or ordinance regulating the rate of speed on a city street, the mere fact of a street car running at a high rate of speed does not constitute negligence, but it is for the jury to say, in view of the surrounding conditions at the time, whether such a rate of speed was excessive and, therefore, dangerous

3. **ORDINARY CARE OF MOTORMAN.**—In the absence of evidence that the decedent was on the track when the car approached, and that the motorman saw him in a dangerous place in time to avoid the accident, a charge of negligence on the part of the motorman in failing to stop the car or check its speed so as to enable the decedent to escape from his position of peril is not sustained.
4. **PROOF OF NEGLIGENCE.**—The burden of proving the negligence charged is upon the plaintiff. It is not enough to show an accident and an injury. There must be a direct connection between the negligent act and the injury, and the negligence must be the proximate cause of the injury.
5. **CONJECTURAL CAUSE.**—If the injury may have resulted from one of two causes, for one of which, and not the other, the defendant is liable, it must be shown with reasonable certainty that the cause for which the defendant is liable produced the result; and if the evidence leaves it to conjecture, the plaintiff must fail in his action.

APPEAL by defendant from a judgment setting aside a nonsuit. Decided November 25, 1903. Reported 178 Mo. 125, 77 S. W. 67.

McKeighan & Watts and Robert A. Holland, Jr., for appellant.

R. L. & John Johnston, for respondent.

Opinion by MARSHALL, J.

This is an action under the statute to recover \$5,000 damages for the death of the plaintiff's husband, Ira B. Warner, on Janu-

under the circumstances. *Nellis Street Railroad Accident Law*, p. 278, and cases cited. The question as to whether a certain rate of speed is negligent will depend in every case upon the existing circumstances. See *Nellis Street Railroad Accident Law*, p. 280. As to excessive rate of speed in a narrow street, see *Louisville Ry. Co. v. Teekin*, 2 St. Ry. Rep. 311, (Ky.) 78 S. W. 470.

Duty to sound gong.—See *Lynch v. Third Ave. R. Co.*, 2 St. Ry. Rep. 785, 88 App. Div. (N. Y.) 604, 85 N. Y. Supp. 180; *Union Traction Co. v. Vandercook*, 2 St. Ry. Rep. 231, (Ind. App.) 69 N. E. 486; *Dalton v. N. Y., N. H. & H. R. Co.*, 2 St. Ry. Rep. 429, (Mass.) 68 N. E. 830; *Buren v. St. Louis Transit Co.*, 2 St. Ry. Rep. 616, (Mo. App.) 78 S. W. 680.

Proximate cause of injury.—The negligence which is alleged to have produced the injury complained of must be the immediate cause of such injury. *Martin v. St. Louis, etc., Ry. Co.*, 55 Ark. 510, 19 S. W. 314; *Gates v. Burlington, etc., R. Co.*, 39 Iowa, 45; *Hinchey v. Manhattan Ry. Co.*, 49 N. Y. Super. Ct. 406; *Broussard v. Sabine & E. T. Ry. Co.*, 80 Tex. 329, 16 S. W. 30. See *Nellis Street Railroad Accident Law*, pp. 24-35.

ary 22, 1900, on Lockwood avenue, between Gore and Grey avenues, in the town of Webster, alleged to have been caused by being struck and mortally injured by one of defendant's cars, then being run on the defendant's street railroad tracks upon said street. The accident occurred between 7 and 8 o'clock at night, and the petition charges that the night was "quite dark," and the tracks at the point of the accident were "dimly lighted," and the accident is alleged to have occurred about seventy feet east of Grey avenue. The negligence charged in the petition is that

"The said car was then and there running east on a down grade at a rapid and dangerous rate of speed, and no bell was sounded nor warning given by said defendant, its agent and employees in charge of said car, until too late to enable said deceased to avoid said collision and escape from his perilous position; that defendant's motoneer in charge of and running said car saw, or by the exercise of ordinary care would have seen, the said peril of plaintiff's said husband at said time and place in time to have stopped said car and avoided said collision, or so checked the speed and delayed said car as would have given said deceased sufficient time to escape from his position of peril upon said tracks, but defendant's said motoneer then and there carelessly, negligently, and recklessly failed so to do."

The answer is a general denial and a plea of contributory negligence. At the close of the plaintiff's case the defendant demurred to the evidence. The court sustained the demurrer, and the plaintiff took a nonsuit with leave. The plaintiff moved to set aside the nonsuit. The court sustained the motion on the ground that it had erred in sustaining the demurrer to the evidence, and the defendant appealed from that ruling of the court. As the only question in the case that is open to review in this state of the record is whether the plaintiff made out a case for the jury, the evidence will be stated and considered in the course of the opinion, rather than stating it separately.

1. The error assigned is that the trial court erred in setting aside the nonsuit, because the plaintiff made out no case that entitled her to go to the jury. In cases of this character this court has always refused to interfere with the discretion of the trial court in granting one new trial to a party litigant, unless the case was such that under no circumstances whatever could a verdict in favor of the plaintiff be allowed to stand. *Hoepper v. Southern Hotel Co.*, 142 Mo. (loc. lit.) 387, 44 S. W. 257; *Haven v. Rail-*

road Co., 155 Mo. (loc. cit.) 229, 55 S. W. 1035, and cases cited. The facts disclosed by the evidence are that the defendant is an electric street railroad, and has a line of double tracks on Lockwood avenue, in the town of Webster. The poles that carry the trolley wire are located between the tracks. Between Gore avenue and Jefferson Barracks road — a distance of over 1,000 feet — the track is straight. Between Grey avenue and Silent avenue there is a depression in the street, so that looking westwardly from a point at any place between Gore and Grey avenues only the top of the car can be seen, but the noise made by the running of the car can be easily heard. Between Gore and Grey avenues there were three trolley poles — one about 70 feet east of the east line of Grey avenue, one 113.5 feet east thereof, and the third 114 feet east of the second. It was customary for vehicles traveling west on the north side of Lockwood avenue, and desiring to go south to Grey avenue, to cross the defendant's tracks between the first and second or between the second and third of these trolley poles, instead of waiting until they reached Grey avenue. On the night in question a car of the defendant was going eastwardly on Lockwood avenue. It was running at the usual rate of speed, which is shown to be faster than cars usually run in the city of St. Louis, but not faster than the defendant's cars usually run at that place. The gong was sounded at Rock Hill road, which was about 1,000 feet west of Grey avenue. The gong was also sounded sharply three times when the car approached Grey avenue, and which was about 160 feet west of the first trolley pole above described. The car ran on eastwardly until it neared Gore avenue, which is 350 east of Grey avenue, when it was stopped, and the motorman said he had hit "some one" or "something," and had to go back to find out what it was. He and the passengers on the car then went back toward Grey avenue. When they reached the first trolley pole east of Grey avenue they found a two-wheel cart, with the left wheel fastened around the trolley pole, and the ends of the shaft resting on the north rail of the east-bound track, and such ends were crushed, showing they had been run over by the car. They also found the body of the deceased lying between the east and west-bound tracks, with his head toward the east-bound track, and about ten feet east of the trolley

pole, to which the cart was fastened as aforesaid. He had been hit on the head and was unconscious. He was taken on the car to the Baptist Sanitarium in St. Louis, where he lingered until February 9th, when he died without regaining consciousness. No horse was found at or near the place of the accident. It appeared that the deceased lived about three miles south of Webster, and that he had business at Webster and Clayton every few weeks, and that it was his habit, when returning from Clayton, to drive south on Gore avenue to Lockwood avenue, thence west on the north side of Lockwood avenue until he reached the place between the first and second or second and third poles, where vehicles going south usually crossed the defendant's tracks, and thence along the south side of Lockwood avenue until he reached Grey avenue, and to proceed southwardly on Grey avenue to his home. On the day of the accident he went alone to Clayton in his cart. It appeared that the car had a headlight on it that threw the light for a distance of about 125 feet ahead of it, and that the car was about ten feet in height, and was lighted by electricity. No one saw the car strike the deceased. No one saw the deceased upon the track, or so near to it as to be in danger of being struck by the car. The physical facts show that the deceased had been hit on the head, but no one knew whether the car hit him or what hit him, and the physical facts would not tell the tale. The physical facts simply showed the left wheel of the cart fastened around the trolley pole, the ends of the shaft extending toward the south and resting on the north rail of the east-bound track, and that such ends had been crushed by the car running over them, and the body of the deceased lying between the tracks, but entirely outside of the tracks on which the car was running. This was the case made by the plaintiff, and upon this showing the court took the case away from the jury.

The first act of negligence charged against the defendant is that it ran the car at a rapid and dangerous rate of speed. The only evidence adduced in the case is that offered by the plaintiff, and, instead of even tending to support this charge, it is all to the effect that the car was running at the usual rate of speed. None of the witnesses were able to state the exact speed, but they all agree that it was the usual rate at which the cars ran over that part of the

road. This charge of negligence was, therefore, expressly disproved by the plaintiff, and need not be further considered.

The second act of negligence charged against the defendant is that no bell was sounded or warning given by the servants in charge of the car until it was too late to avoid collision and to enable the deceased to escape from his perilous position. The evidence not only wholly failed to support this charge, but, on the contrary, it expressly disproves it, for it shows that the gong was sounded when the car was about 1,000 feet from the place of accident, and that it was further sounded sharply three times as the car neared Grey avenue, and at a point about 160 feet distant from the place of accident. This charge of negligence was, therefore, disproved.

The third act of negligence charged is that the motoneer in charge of the car saw, or by the exercise of ordinary care could have seen, the peril of the deceased in time to have stopped the car and to have avoided the accident, or to have so checked the speed of the car as to have afforded the deceased time to escape from his position of peril, and carelessly, negligently, and recklessly failed so to do. There is not a scintilla of evidence to support this charge. There is absolutely no evidence whatever that the deceased was on the track when the car approached, nor that the motorman saw him in peril, or at all, in time to avoid the accident, nor that there was any collision between the car and the deceased, nor that the injuries of the deceased were inflicted by the car. Neither do the physical facts afford any ground whatever for drawing such an inference of fact. The only thing the physical facts show is that the wheel of the car was fastened around the trolley pole, that the ends of the shaft rested on the north rail of the east-bound track, and were crushed by the car running over them. There was no horse there or about there. These physical facts show that, if the deceased had been sitting in the cart when the car passed, he could not possibly have been hurt, for only the ends of the shaft were on the track. From the fact that there was no horse there, and from the fact that the ends of the shaft were resting on the track, and were crushed by the car, the conclusion is inevitable that the wheel of the cart had become fastened around the trolley pole, and the horse had broken

loose from the cart and run away, and the ends of the shaft had fallen onto the track before the car reached that point. And the only reasonable and fair inference that can be drawn from all the physical facts is that in some way the cart was run upon and became entangled with the trolley pole, and the deceased was thrown out of the cart by the collision of the cart with the trolley pole, and was injured by striking on his head when he fell, and that the horse broke loose and ran off, and that the cart was in that condition and the deceased was already hurt before the car reached the spot. What was the cause of all this is a mere matter of guess or conjecture, but there is nothing in the facts shown or the physics of the case that has even a reasonable tendency to support the negligence charged in the petition.

The burden of proof is primarily upon a plaintiff to prove the negligence charged. It is not enough to show an accident and an injury. A causal connection must be established between the accident and the negligence charged in order to make out a case for the jury. Failing in this, as this plaintiff did, the courts should take the case from the jury, because, if it was submitted to the jury, and if a verdict was returned for the plaintiff, it could not stand, for the reason that it would have no foundation in law or in fact to rest upon. *Holman v. Railroad Co.*, 62 Mo. 562; *Sorenson v. Paper Co.*, 56 Wis. 338, 14 N. W. 446. In other words, the mere concurrence of negligence and injury does not make the defendant liable. There must be a direct connection between the negligent act and the injury, and the negligence must be the proximate cause of the injury. *Reed v. Railroad Co.*, 50 Mo. App. 504; *Stepp v. Railroad Co.*, 85 Mo. 229; *Moberly v. Railroad Co.*, 17 Mo. App. 518; *Stoneman v. Railroad Co.*, 58 Mo. 503; *Harlan v. Railroad Co.*, 65 Mo. 22; *Nolan v. Shickle*, 3 Mo. App. 300, 69 Mo. 336; *Settle v. Railroad Co.*, 127 Mo. 336, 30 S. W. 125, 48 Am. St. Rep. 633; *Kennayde v. Railroad Co.*, 45 Mo. 255; *Stanley v. Railroad Co.*, 114 Mo. 606, 21 S. W. 832. If the injury may have resulted from one of two causes, for one of which, and not the other, the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result; and, if the evidence leaves it to conjecture, the plaintiff must fail in his action. *Smart*

v. *Kansas City*, 91 Mo. App. 586; *Epperson v. Telegraph Co.*, 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050; *Smith v. Bank*, 99 Mass. 605, 97 Am. Dec. 59; *Searles v. Railroad Co.*, 101 N. Y. 661, 5 N. E. 66; *Pierce v. Kile*, 80 Fed. 865, 28 U. C. A. 201. In addition, therefore, to the fact that the evidence wholly fails to support the acts of negligence charged in the petition, the proofs and physics of the case wholly fail to show any causal connection between the negligence charged and the injury, and the facts disclose that the injuries may have occurred from other causes than the negligence of the defendant charged. The plaintiff, therefore, was properly nonsuited, and the court erred in granting a new trial.

The judgment of the Circuit Court sustaining the motion to set aside the nonsuit is, therefore, reversed, and the cause remanded to that court, with directions to vacate its order setting aside the nonsuit, and to enter judgment upon the nonsuit theretofore ordered. All concur.

Parks v. St. Louis & Suburban Railway Co.

(Missouri—Supreme Court, Division No. 1.)

1. INJURY TO PASSENGER ON PLATFORM OF CROWDED CAR;¹ CONTRIBUTORY NEGLIGENCE.—The plaintiff was a passenger on a car of the defendant suburban railway company which was crowded to such an extent as to compel him to ride on the front platform outside of the gate on the side next to the tracks of the other defendant railway company; while so riding he was struck by a car of the latter company passing in an opposite direction and seriously injured. It appeared that the motor-man of the car on which he was riding warned him of his dangerous position, but the conductor accepted his fare without mentioning the

1. Passenger riding on crowded platform.—It is not contributory negligence *per se* for a passenger on a street car to ride on the platform, running-board, or steps of the car in the absence of special circumstances, showing it to be such. *Nellis Street Railroad Accident Law*, p. 128, and cases cited. Neither the carrier nor the public have regarded the platform of a street car as a known place of danger, and courts have, therefore, held that a passenger who rides thereon is not guilty of such contributory negligence, as a matter of law, as will prevent his recovery for an injury sustained through the fault of the employee of the company. It is a circumstance to be submitted to and determined by the jury. *Watson v. Portland & C. E. Ry. Co.*, 91 Me.

danger. The accident occurred while rounding a curve, and it was a rule of the defendants that the car not having the right of way should stop before entering the curve, to permit the passage of cars from the opposite direction; the evidence was conflicting as to whether such rule was observed. It was held that the defendant assuming to carry the plaintiff in such dangerous position must use care for his safety in proportion to the danger; and at the same time the plaintiff was bound to observe such care for his own protection as an ordinarily prudent man would be expected to observe in a like position under like conditions. The question as to whether the taking of such a position was contributory negligence is for the jury.

2. **ASSUMPTION OF RISK OF DANGEROUS POSITION** — A passenger never assumes the risk of a street railway company's negligence. He only assumes the risk incident to traveling on the company's cars according to the circumstances and conditions of his position, not connected with the company's negligence. If the injury resulted not alone from the danger incident to the act of traveling under the given circumstances and conditions, but resulted because to that danger was added the consequence of the negligent act of the carrier, there was no such assumption of risk as would relieve the company from liability.

APPEAL by defendant from judgment for plaintiff. Decided November 25, 1903. Reported 178 Mo. 108, 77 S. W. 70.

McKeighan & Watts and Robt. A. Holland, Jr., for appellants.

Wm. R. Gentry, for respondent.

Opinion by VALLIANT, J.

Defendants, two street railway companies, appeal from a judgment for \$5,000 recovered against them in the Circuit Court of St. Louis county by the plaintiff on account of personal injuries

584, 40 Atl. 699, 64 Am. St. Rep. 268, 44 L. R. A. 152, in which case the court said: "Riding upon the platforms of such cars is too much encouraged by transportation companies and too much indulged in by the public, for the court to say, as a matter of law, that the mere riding upon a platform of such a car is conclusive evidence of negligence, or is negligence *per se*, or is negligence in law. It depends upon too many other circumstances and conditions for a court to lay down any hard and fast rule in regard to it; but it is a fact which should ordinarily be submitted to the jury in connection with all of the other circumstances of the case." See also *Wilde v. Lynn*, etc., R. R. Co., 163 Mass. 533, 40 N. E. 851; *Fleck v. Union Ry. Co.*, 134 Mass. 480; *Maguire v. Middlesex R. Co.*, 115 Mass. 239; *Meesel v. Lynn*,

alleged to have been received by him through their negligence. There is not much dispute as to the governing facts of the case. In June, 1900, there was a strike among the employees of all the other street railroad companies in the city of St. Louis, and the only street cars running were those operated by the defendant companies. The consequence was the cars of these two companies were crowded with passengers beyond their normal carrying capacity. People crowded in, filling the bodies of the cars, the platforms, and every part where a seat or foothold could be obtained. Plaintiff on June 14, 1900, boarded a west-bound car of the St. Louis & Suburban Railway Company, which we will call the Suburban car, at the crossing of Fourteenth street and Franklin avenue. The car was crowded with passengers to such an extent that the only space plaintiff could obtain on it was standing room on the step of the front platform, outside of the gate that inclosed the platform. There was another man and a boy standing on the step in the same attitude plaintiff took. During the period of this strike it was not unusual for men to ride on the steps of the platform, outside the gates, as those men were doing. At the point where plaintiff boarded the car the defendant's railway runs north and south, but a short distance after passing Franklin avenue it turns west, which is its main course. It is a double-track road, and the cars of both defendant companies run over it. The step on which the plaintiff took his position was on the west side of the car going north, which would become the south side after it turned

etc., R. Co., 8 Allen (Mass.), 234; *Pray v. Omaha St. Ry. Co.*, 44 Nebr. 167, 62 N. W. 447, 48 Am. St. Rep. 717; *Reber v. Pittsburg, etc., Traction Co.*, 179 Pa. St. 339, 36 Atl. 245, 57 Am. St. Rep. 599; *Vail v. Broadway R. Co.*, 147 N. Y. 377, 42 N. E. 4; *Nolan v. Brooklyn City, etc., R. Co.*, 87 N. Y. 63, 41 Am. Rep. 345; *City Ry. Co. v. Lee*, 50 N. J. L. 435, 14 Atl. 883, 7 Am. St. Rep. 798. See also *Seller v. Market St. Ry. Co.*, 1 St. Ry. Rep. 8, and note, (Cal.) 72 Pac. 206; *Moser v. South Covington & Cin. St. Ry. Co.*, 1 St. Ry. Rep. 240, 25 Ky. Law Rep. 154, 74 S. W. 1090; *Zimmer v. Fox River, etc., Ry. Co.*, 1 St. Ry. Rep. 838, (Wis.) 95 N. W. 957; *Shearon v. Coney Island, etc., R. Co.*, 2 St. Ry. Rep. 796, 89 App. Div. (N. Y.) 336, 85 N. Y. Supp. 958; *Moskowitz v. Brooklyn Hts. R. Co.*, 2 St. Ry. Rep. 619, 89 App. Div. (N. Y.) 425, 85 N. Y. Supp. 960; *Gatens v. Metropolitan St. Ry. Co.*, 2 St. Ry. Rep. 793, 89 App. Div. (N. Y.) 311, 85 N. Y. Supp. 967; *Aston v. St. Louis Transit Co.*, 2 St. Ry. Rep. 631, (Mo. App.) 79 S. W. 999.

west, and was the inside; that is, the side next to the other track, over which the east-bound cars came. The outside line of the step on which the plaintiff stood was on a line with the outside of the car, but the plaintiff's body projected beyond that line. He could not press himself closer in. The motorman saw the men and the boy on the step, and told them it was dangerous to ride there, and that they ought to try to get on the other side, but they did not change their position. The conductor also saw the plaintiff there, and asked him for his fare while he was in that position, and received it. The plaintiff rode standing on the step, outside the gate, from Fourteenth street to a point just beyond Vandeventer avenue, a distance of probably two miles or more, where the accident occurred. In going that distance the car passed around two or three curves, and met several cars east-bound on the other track. Just west of Vandeventer avenue the tracks of the defendant companies curve to the north, and then turn again to the west. Cars going in opposite directions, meeting in this curve, were brought more or less nearly in contact, according to the point in the curve at which they passed each other. The space between cars thus passing was variously estimated by different witnesses, but the testimony of all of them showed that at some point in the curve the meeting cars would come so close to each other that extra care was to be observed to avoid contact, and it was made the subject of especial regulation. The printed rules of the companies gave the east-bound cars the right of way in the forenoon, and the west-bound in the afternoon. Plaintiff was on a west-bound car, and it was about 5 or 6 o'clock in the afternoon, so that this car had the right of way. The rules also required the car that did not have the right of way to come to a stop forty feet before entering the curve, to allow a car coming in the opposite direction to pass through the curve without danger of contact. On this occasion, as the Suburban car going west approached this curve, a car of the St. Louis & Meramec River Railroad Company, which we will call the Meramec car, approached it from the opposite direction. Each of these cars was in plain view of the motorman in charge of the other. There is some conflict in the evidence as to whether the east-bound car stopped at all before the accident, but, if it stopped at all, it did so very close to or just at

the entrance of the curve. There is also some conflict as to the speed at which the Suburban car entered the curve and was going when the accident occurred. But whatever the truth about those disputed points may be, the fact is that the position of the Meramec car in reference to the curve was such, and the movement of the Suburban car into and around the curve was such, as that the plaintiff's body was brought into violent contact with the Meramec car, and he was rolled between the two cars until the space between them became wider, and he was dropped to the ground, having received serious injuries.

1. Appellants' first proposition is that the court erred in refusing the instruction in the nature of a demurrer to the evidence which defendants asked. The substance of the proposition is that the position taken by the plaintiff on the step of the platform was so obviously dangerous, and it so obviously contributed to the accident, that the court should have adjudged the plaintiff, on his own evidence, guilty of contributory negligence. There are two stand-points from which this proposition is to be considered:

(a) That the plaintiff's position was one of danger, and that he would not have been injured if he had not been where he was, are facts indisputable. But was he guilty of negligence in being there? We need not dwell on the fact that the car was so crowded he could not get on it in any other position, because he was not compelled to get on it at all. His taking passage on the car was a voluntary act. Traveling on a street car in a great city is always attended with danger, whatsoever position in or on the car the passenger may assume. But if it is a position that the carrier offers to the passenger, or a position which the carrier assents to his taking, and knowingly assumes to carry him in that position, then it becomes the duty of the carrier to carry him safely in that position, if it can be done by the exercise of that high degree of care which the law requires the carrier to observe for the safety of its passengers. The degree of care to be observed by the carrier in such case must be in proportion to the danger which the passenger's position entails. The more dangerous the position, the greater the care the carrier is bound to observe. And at the same time the law imposes on the passenger in like case the duty of observing for his own safety the care that a man of ordinary pru-

dence under like circumstances would observe, and that care, too, must be in proportion to the apparent danger. The more dangerous the position, the more care a prudent man would be expected to observe. It is the duty of a carrier who has undertaken to carry a passenger in such a position to carry him safely, if it can be done by the exercise of the degree of care above mentioned; and it is correspondingly the duty of the passenger, after he has taken that position, to observe such care for his own protection as an ordinarily prudent man in a like position and under like conditions would naturally be expected to observe. Under those circumstances, if the passenger is injured from a cause arising out of or incident to the position itself, without failure of duty on the carrier's part, the carrier is not liable. And though in such case the carrier fail to perform its duty, and that failure results in the accident, still, if the passenger fails also in his duty as above defined, and his failure contributes to bring about the result, he cannot recover. But in judging the conduct of both carrier and passenger we must look only to conduct after the passenger has assumed the position, not charging the position itself to either as an act of negligence, but requiring both to keep in mind the peril incident to the position, and regulate their conduct in reference thereto. In this case the carrier knew the position the passenger had taken, and assented thereto, and undertook to carry him in that position. We say this because the motorman saw him there, and warned him that it was a position of danger, and the conductor saw him there, and, without warning and without remonstrance, asked him for his fare, and received it. If that had been a position of such danger that the carrier was unwilling to assume the duty of carrying the plaintiff therein, the carrier had the right to require the plaintiff to leave the car. It was an unusual position — one involving more than usual risk — and the carrier had the right to refuse to carry him in that position. But unless some other circumstance or condition arose to increase the hazard, it was feasible to carry a passenger safely in that position. This is shown by the fact that during this period of overcrowded cars the defendants did carry men safely in that position, and especially by the fact that this plaintiff was carried safely from Fourteenth street to Vandeventer avenue, passing en route many cars

on the other track, and passing through two or three other curves. There is no act of the plaintiff after taking his position on the step that is complained of as negligence. The foregoing views accord with former decisions of this court. *Huelsenkamp v. Railway Co.*, 37 Mo. 537, 90 Am. Dec. 399; *Willmott v. Railway Co.*, 106 Mo. 535, 17 S. W. 490; *Seymour v. Railway Co.*, 114 Mo. 266, 21 S. W. 739.

(b) But assuming that taking the position on the step of the platform was itself an act of negligence, and that it contributed to the occurring of the accident, still there was a question for the jury. The motorman and conductor both knew the man was there, and knew the peril of his position. They also knew that he could not jump from the car while it was passing through the curve without the risk of falling and being run over by the approaching east-bound car, or of being run over if he did not fall. Yet, in plain view of the other car, and seeing that it had not stopped as the rules of the company required, and as common sense dictated, the motorman of the Suburban car ran his car into the curve and on until he had crushed the plaintiff's body against the Meramec car. The facts of this case make a strong example of the wisdom of the rule which allows a plaintiff in exceptional cases to recover, notwithstanding his own contributory negligence, when the defendant sees the plaintiff's peril, and, although able by ordinary care to avoid it, yet recklessly or wantonly inflicts the injury. *Kellny v. Railway Co.*, 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783; *Morgan v. Wabash R. Co.*, 159 Mo. 262, 60 S. W. 195.

The court did not err in refusing an instruction looking to a nonsuit.

2. The plaintiff's petition stated his cause of action based on alleged negligence of the defendants in bringing their cars into collision, or such close proximity as to cause the plaintiff's injuries. The answer of the defendants consisted of a general denial, a plea of contributory negligence based on the act of the plaintiff in taking the dangerous position on the step of the platform, and then followed what in their brief the learned counsel for appellants call a plea of assumption of risk, which is as follows: "And for a further defense defendants state that all the details of defendants' tracks, and the manner of operating cars

thereon, were known to plaintiff, or by the exercise of ordinary care might have been known to plaintiff, and that the danger of riding upon the southern steps of the front platform of the west-bound car was known to plaintiff, or by the exercise of ordinary care might have been known to plaintiff, and that plaintiff assumed the risk of riding upon said part of said car on said occasion." Appellants now complain that the instruction given at the request of the plaintiff ignored the defense set up in that plea. That is not a good plea. The fact that the plaintiff had negligently taken a position on the platform step, outside the gate, was a fact already properly pleaded as an act of contributory negligence. To the plea of contributory negligence the plaintiff replied, and the issue was properly joined. But the part of the answer above quoted, and which appellants call their plea of assumption of risk, presents no affirmative defense. If it is intended by that plea to say that the plaintiff's injuries were the result solely of his voluntary act of riding on the step of the platform, then it means that the injuries were not the result of the defendants' negligence, which defense was already covered by the plea of general denial. The petition having charged that the plaintiff's injuries were caused by the defendants' negligence, and the defendants having denied that charge, they were at liberty, under their general denial, to prove anything to show that the plaintiff's injuries did not result from their negligence. That which can be proven under the general denial already pleaded is improper to be specially pleaded. If the pleader intended to say that to ride in that position was so dangerous that injury to the plaintiff could not have been avoided by the exercise of the care incumbent on the carrier, and that the fact that it was so dangerous was obvious or known to the plaintiff, then the fault of the plea is that it does not say that; and, in the light of the evidence, if it had said so, the court would not have committed error in ignoring it in the instructions, because there was no evidence to support it. All the evidence shows that the accident would not have occurred if the motorman had used even ordinary care. If by that plea it was intended to say that the plaintiff's negligent act of riding on the step, joined with the defendants' negligent act of attempting to pass two cars in a space that was not wide enough for them to pass

in safety, and that thus the plaintiff contributed to cause his own injury, that defense was already covered by the plea of contributory negligence. But if it was intended by the plea to say that the plaintiff, by voluntarily taking that position, released the defendants from their duty to exercise the degree of care due from the carrier to the passenger, or if it was intended to say that by taking that position the plaintiff assumed not only the risk incident to it, but assumed also the risk of the defendants' negligence, then it was not a good plea. The passenger never assumes the risk of the carrier's negligence. There is always a risk of personal injury to a person traveling, even if there be no negligence either on his own part or on the part of the carrier. That risk is incident to the act of traveling, and is greater or less according to the circumstances and conditions. That risk the passenger assumes. But if to the danger incident to the act of traveling under the circumstances and conditions of the particular case is added a danger caused by the negligence of the carrier, the passenger does not assume the risk of those combined dangers. If the catastrophe in question did not result alone from the danger incident to the act of traveling under the given circumstances and conditions, but resulted because to that danger was added the consequence of the negligent act of the carrier, there was no such assumption of risk as would relieve the carrier from liability. Assumption of risk is one thing, and contributory negligence is another. *Curtis v. McNair* (Mo. Sup.), 73 S. W. 167. The court did not err in ignoring that plea in its instructions.

Instruction No. 3 given for the plaintiff begins as follows: "The jury are instructed that if you believe and find from the evidence in this case that the servants of defendant St. Louis & Meramec River Railroad Company, who were in charge of its said east-bound car on the occasion mentioned in the evidence, prior to and at the time of the alleged injury to plaintiff, were not exercising ordinary care to avoid said collision," etc. Appellants complain of this instruction because they say that by the use of the words "said collision" it assumes that there was a collision, instead of submitting the question to the jury. There was no dispute on that point. The evidence of defendants showed that there was a collision, as well as that of the plaintiff. Al-

though the general denial met every fact stated in the petition in issue, yet a fact about which there was no real dispute, and that was conceded at the trial, may be assumed in an instruction.

The defendants asked five instructions, marked B, C, D, E, and F, the effect of which were that the plaintiff, by taking the position of obvious danger on the step of the platform, was not entitled to recover. From what we have above said, it will appear that there was no error in refusing those instructions.

Instruction G asked by defendant was to the effect that, if the Meramec car at the moment of the accident was not passing through the curve, the verdict should be in favor of the Meramec Company. That instruction called for a verdict for that defendant, even though the Meramec car had stopped after it had entered the curve, as some of the evidence tended to show, at a point where the danger was greatest. It was not error to refuse that instruction.

3. It is earnestly argued that the damages awarded by the jury are excessive. We do not deem it necessary in this opinion to discuss the evidence bearing on this point. It is sufficient to say that the assessment by the jury is not so much out of the way as to justify us in invading their peculiar province. There is nothing to indicate that it is not the result of calm judgment, and we will not disturb it.

We find no error in the record, and therefore the judgment is affirmed. All concur.

Meeker v. Metropolitan Street Railway Co.

(Missouri—Supreme Court, Division No. 1.)

1. DEATH OF CHILD CAUSED BY COLLISION;¹ NEGLIGENCE IN FAILING TO STOP CAR.—The plaintiff's child, four years of age, was killed while attempting to cross the tracks of the defendant by being struck by one of its cars. The negligence charged was the failure of the defendant's gripman to stop the car after he noticed the perilous position in which the child was placed. The evidence was considered and held sufficient to warrant the submission of the question to the jury.

1. See cases cited in note to *Jett v. Central Elec. Ry. Co.*, *ante*, p. 513.

2. **PERILOUS POSITION OF CHILD ON TRACK.**—An instruction to the jury to the effect that the law did not require the employees of the defendant to stop the car until they saw, or might have seen by the exercise of reasonable care, that the child was in a position of peril, or was about to be placed in such a position, and that if the evidence shows that as soon as the child was in such position or was about to be placed therein, the employees used reasonable care to prevent the injury complained of, but were unable to do so, then the plaintiffs cannot recover, was sustained. The principle was applied that the servants of a street railway company are required to stop a car when they see, or may see by the exercise of reasonable care, that a child is in a position of peril by being on the track, or is about to be placed in such peril.

APPEAL by defendant from judgment for plaintiffs. Decided November 25, 1903. Reported 178 Mo. 173, 77 S. W. 58.

Jno. H. Lucas, for appellant.

Scarritt, Griffith & Jones, for respondents.

Opinion by **MARSHALL, J.**

This is an action, under the statute, by the parents, to recover \$5,000 damages for the death of their four-year-old daughter, Henrietta, caused by being run over by one of the defendant's cable cars at the corner of Summitt avenue and Twenty-third street, in Kansas City, on July 9, 1900, at about 9 o'clock, A. M. There was a judgment below for the plaintiffs for the amount claimed, and the defendant appealed.

The negligence charged in the petition is that the defendant's servants "saw the child upon the tracks of said defendant and approaching there at said crossing of said Summitt and Twenty-third streets in a position of imminent peril, or when, by the exercise of ordinary care, they might have seen said child upon said tracks and approaching thereto in such position of imminent peril, in time to have stopped said train of cars and avoided the injury complained of"; and, further, that the operatives of the cars failed to ring the bell, or to give any notice or warning to the plaintiff's daughter of the approach of the car. The trial developed the facts to be as follows: Summitt avenue runs north and south. Twenty-third street runs east and west, and is sixty feet wide. Summitt avenue slopes downward from the north

toward Twenty-third street on a 2 per cent. grade, and is level where it intersects Twenty-third street. Beginning at the south line of Twenty-third street, Summitt avenue again slopes toward the south on a grade of 6.4 feet to the 100. The defendant has a double, standard gauge cable road on Summitt avenue. The south-bound cars run on the west side of Summitt avenue. The train consisted of two cars — a grip car and a trailer — and together the train was forty-six feet long. From the curb line on the west side of Summitt avenue at the south side of Twenty-third street it is fourteen feet to the east rail of the south-bound track. The curb is six inches thick. In the sidewalk there is a water plug, which stands ten and one-half feet west of the curb. So that from the water plug to the east rail of the south-bound track it is twenty-five feet. The cars run at the rate of nine miles an hour, or thirteen and one-half feet a second. The day was clear, and the tracks and street were dry. The locality is near the southwest terminus of the defendant's road. The plaintiffs lived on Twenty-third street two and one-half blocks west of Summitt avenue. The father is a barber, and was agent for a laundry, and his place of business was on the west side of Summitt avenue about a block south of Twenty-third street. About 9 o'clock on July 9, 1900, the mother started with her little daughter to go down town. When she reached the southwest corner of Summitt avenue and Twenty-third street, she sent the child along the west side of Summitt avenue to take a bundle of laundry to her father's shop, and told her when she returned to wait on that corner for her, and she went across Summitt avenue and a half a block east thereof, on the north side of Twenty-third street, to a grocery store, to make some purchases. The child took the bundle to her father, and returned in safety to the southwest corner of Summitt avenue and Twenty-third street, and stood or was "lifting her little skirts and dancing" at or near the water plug above described. The mother completed her purchases at the grocery store, and proceeded to return for the child. She walked westwardly along the north side of Twenty-third street, and when she reached the car tracks on Summitt avenue, on the north line of Twenty-third street, she saw her child dancing on the sidewalk at the southwest corner as aforesaid. At that time a train of

cars came along, and she had to stop east of the track to let it pass. It ran across Twenty-third street, and the next thing she knew the car had run over her child and killed her. She did not see her child leave the sidewalk and go into the street, for the train of cars was then between her and the child, so she could not see her. She says that no bell was rung or warning given when the car approached Twenty-third street, and that the gripman was sitting on the rail on the left-hand side of his box in the grip car, with one hand resting on the rail on each side of him, and his back toward the east, and was looking toward the rear of the car, and talking to some one who was back there. All the witnesses for both the plaintiffs and the defendant who saw the child say she was on the southwest corner of said streets, and all who saw her move say she walked from the water plug across the sidewalk, and stepped from the curb into the street, and walked directly eastwardly across Summitt avenue on a line with the south line of Twenty-third street. The gripman says he rang his bell when he was opposite the Chadwick Flats, which was north of Twenty-third street, and where Twenty-second street would intersect Summitt avenue if it was cut through, and that he did not ring it any more.

The gripman then testified as follows:

"I was going south, and just as I entered the street I saw a little girl standing on the corner of the curbing about five or six feet south of the street line running east and west. She was standing on the curb on the west side of the street running south, and a little south of the curb that went east and west. She was standing there just apparently quiet, and, as I approached, my car got very near opposite, and she gave a jump and started all at once, and I pulled my brakes as suddenly as possible, and brought my car to a stop as quick as I could make it. I had my car very nearly opposite her — well, it lacked probably five or six feet of being opposite — when she made the jump and started across the track, so I stopped my car as quick as possible. I think I stopped my car within twelve or fifteen feet." He further said he hollered to her just as she was running across the street, and could not remember what he said. He further testified: "Q. You anticipated that she would go in front of the car? A. That she would go in front of the car. I knew the way she started she was going in front of the car the way it was going. She had a very short distance to go, and I had a very short distance to go, and it was impossible to stop before I hit her; and the way she was going the car would about meet her — hit her — right in the center of the track. I know I made a quick stop. I think I never made a quicker stop

than there. With the pitch of the hill the rule is twenty to twenty-five feet in stopping these cars, and I know I didn't go over half the space, and it was right on the pitch of the viaduct where I went down and stopped my car."

He further testified that it was not over ten feet after he struck the child before he stopped the car. The other testimony in the case, however, showed that the child was taken out from under the rear wheel on the east side of the grip car at a point fifty to sixty feet south of the south line of Twenty-third street, and all the testimony is to the effect that her body lay across the east rail of the south-bound track.

The conductor testified:

"We were going south on Summitt avenue just at Twenty-third street, and we were almost or just at Twenty-third street, at the north side, when I noticed a little girl standing on the sidewalk. I can't say just exactly where we were, but I noticed her standing there, and we were almost to her, when I saw her make a bound across the street east, and I saw Mr. Wyatt [the gripman] throw his brake, and I grabbed my brake, but he had the car stopped before I had more than time to get my brakes tight."

H. E. Brown, a passenger, was called as a witness for the defendant, and testified that he was seated in the next to the last seat from the rear of the grip car and on the west side thereof, and that he was looking at his collection book, and did not look up until the car was very nearly across Twenty-third street; that the front end of the grip car was then about across Twenty-third street; that he saw the child about half way between the curb and the west rail of the south-bound track and six or eight feet in front of the car; that she was going diagonally across the street; that the gripman may have seen the child leave the sidewalk, but he did not do so (he was looking down at his book); that the ringing of the bell attracted his attention (the gripman said he did not ring the bell, and that the last time he had rung it was when the car was at the Chadwick Flats, which was a block north of the place of the accident); that he did not hear any cries or screams before the accident; that the body was found under the grip car, resting on the east rail of the south-bound track, and her head toward the east and beyond the rail, and the wheel resting on the abdomen.

Judith Davis testified on behalf of the plaintiffs that she was back of the grocery store which stood on the northwest corner of Summitt avenue and Twenty-third street; that just before the accident she went to the cistern in the yard, and, looking toward the southeast, she saw the child standing on the southwest corner of the streets; that when she first saw her she was standing on the corner; that the child then started to walk directly east across Summitt avenue toward the south-bound track; that at that time, from her position, she could not see the car approaching from the north; that then she saw the first end of the car coming south; that it looked to her that when the child reached the track the child and the car came together.

The plaintiff's evidence tended to show that the car, when running nine miles an hour, could have been stopped in six to ten feet in an emergency, and this was true whether it was on a level or on a down grade of 6.4 per cent., and whether the car was empty or loaded with passengers.

Frank Vaughan, a witness for the defendant, testified that he was on the northwest corner of the streets, and saw the child on the southwest corner by the water plug, and that she stepped off the sidewalk onto the street, and started to walk east across the street, and when she got on the track the car hit her. The street was entirely free and clear of all obstructions that could interfere with the vision at the time of the accident. Other witnesses testified, but their testimony was not materially different from that herein referred to. It appeared that the grip car was equipped with two brakes—an automatic brake, and a hand brake—and the trailer had a hand brake.

At the close of the plaintiff's case the defendant demurred to the evidence, the court overruled the demurrer, and the defendant excepted. The case was sent to the jury upon the theory that the servants saw the child in a position of peril, or by the exercise of ordinary care could have seen her in such a position, or about to be placed in such a position, in time to have averted the injury, and failed to do so. The defendant asked the court to instruct the jury that the defendant could only be held liable if the child was actually on the track and actually in a position of peril, and that it could not be held liable if the child was only approaching

the track and about to be placed in a position of peril; but the court refused to so instruct, and the defendant assigns this as error, together with other rulings to be noted later in the opinion.

1. The principal contention of the defendant is that the demurrer to the evidence should have been sustained. The physical conditions present in this case are: First, a four-year-old girl on the southwest corner of the street at a point twenty-five feet west of the east rail of the south-bound track; second, a train of cable cars on Summitt avenue at the north side of Twenty-third street, running at the rate of nine miles an hour, or thirteen and one-half feet a second, with only one passenger on the grip car, as far as the evidence shows, and distant sixty feet from the place of the accident; third, the child knocked down and run over by the train at or about the south line of Twenty-third street; fourth, the body of the child taken out from beneath the grip car at a point fifty or sixty feet south of the south line of Twenty-third street, and the rear wheels of the grip car resting on the abdomen of the child, and her head toward the east, and extending beyond the east rail of the south-bound track; fifth, a 2 per cent. slope of Summitt avenue north of Twenty-third street, a level space the width of Twenty-third street (sixty feet) and a 6.4 slope toward the south beginning at the south line of Twenty-third street; sixth, the grip car, equipped with an automatic brake and a hand brake; seventh, an unobstructed view of the whole street at the time of the accident.

The testimony for the plaintiffs showed that the car could have been stopped in an emergency in from six to ten feet, and this, too, whether it was on the level or on the grade south of Twenty-third street. The testimony of the gripman was that from twenty to thirty-five feet was allowed in which to stop on that grade, but that he stopped within ten feet after the car struck the child; and the testimony was practically all to the effect that the child was dragged by the grip car, and was taken out from under the grip car, at a point from fifty to sixty feet south of the south line of Twenty-third street. The testimony is also undisputed that at some time after the train passed the north line of Twenty-third street the child left the southwest corner of the streets, and started east across Summitt avenue — directly across, the most of the

witnesses say, and diagonally across, the others say — and that she had traveled the space of ten and one-half feet from the water plug to the curb line, stepped from the curb to the street, and traveled fourteen feet farther eastwardly, and had nearly crossed the south-bound track, when she was struck by the car. In other words, that a child four years old traveled twenty-five feet toward and upon the track while the car was traveling sixty feet. And that the gripman saw the child on the corner when he was sixty feet north of the corner, and that thereafter the child had time to leave the corner and travel twenty-five feet toward and nearly across the track while the car was running sixty feet, but that the gripman did not see, and could not have seen, the child approaching the track until the car was within six or eight feet of her, and could not have stopped the car in time to have avoided the accident, although the street was perfectly clear and there was nothing to obstruct the vision. Or, otherwise stated, that a four-year-old girl can walk or run twenty-five feet while a train traveling at the rate of nine miles an hour travels sixty feet. At such a rate of speed the train would travel the sixty feet in about four and one-half seconds. If the child traveled twenty-five feet in four and one-half seconds, it would be 5.5 feet a second, or 19,800 feet an hour, or a little less than four miles an hour; that is, that the cable car ran only about twice and two-fifths times as fast as the child.

But, if all this be conceded, the fact would still remain that there was nothing to prevent the gripman from seeing the child at any time after she started toward the track. He admits he saw the child when she was within six or eight feet of the track, and says it was too late then to stop the car in time to avoid the injury, and he and the conductor both say she just jumped in front of the car. But this in no wise explains or satisfies the mind as to why the gripman did not see the child after she started toward the car and while she was traversing the seventeen to nineteen foot interval before she reached the point six to eight feet from the track where the gripman and conductor saw her. No reason is given why they did not see the child approaching the track before she got so close to the car, and none can be given except that the gripman did not look, but, as the mother testified was the fact,

was looking toward the rear of the car, talking to some one back there. The testimony all shows that the gripman could and would have seen the child in time to have averted the injury if he had been attending to his duty. The plaintiff's testimony is that he could have stopped the car in six to ten feet, and the gripman says he did stop the car in ten feet after the car struck her. The fact that she was dragged after being struck, and that her body was taken out from under the car at a point fifty to sixty feet south of the south crossing on Twenty-third street, over which the child was attempting to pass when she was struck, proves that the gripman did not commence to stop his car until he had at least reached the south crossing on Twenty-third street, and also proves that, if he had been doing his duty, he could have stopped the car on the sixty-foot level of Twenty-third street, and before it reached the south crossing, and could thereby have averted the injury. Whether, therefore, the case be viewed solely in the light of the physical facts and the testimony adduced by the plaintiffs, or upon the whole case made, the conclusion is irresistible that the plaintiffs made out a proper case for the jury, and that upon the whole case the verdict of the jury is for the right party.

2. The defendant assigns as error the modification of its eighth instruction, which was as follows, the modification being the words embraced in brackets: "Even if the jury find from the evidence that the employees of defendant in charge of the train in question saw the child approaching in the direction of the street car tracks, still you are instructed that the law did not require them to stop the train until they saw, or might have seen by the exercise of reasonable care, that the child was [or about to be placed] in a position of peril. And if you find from the evidence that as soon as the child was [or about to be placed] in such position of peril they used reasonable care to prevent the injury complained of, but were unable to do so, then plaintiffs cannot recover, and your verdict must be for defendant." The defendant claims that the modification enlarged the issues, and, without this, that it misstates the law, in that it makes the defendant liable if the child was in a position of peril as well as if it was "about to be placed" in such a position, and it claims that the latter is not the law. The modification did not enlarge the issues, for

the petition charged the negligence to be that the servants of the defendant "saw the child upon the tracks of the said defendant and approaching thereto," etc. This is tantamount to the same thing as expressed in the instruction that the child was in a position of peril, or about to be placed in such position.

The defendant is also in error upon the proposition of law. In *Bunyan v. Railroad Co.*, 127 Mo. 13, 29 S. W. 842, the charge of negligence was that the servants failed to see the deceased approaching the tracks and being on or near the tracks in a place of danger, or, as stated by Macfarlane, J., speaking for the court:

"The action is grounded upon the negligence of the gripman in failing in his duties after deceased had placed, or was about placing, himself in a dangerous position;" and the learned judge disposed of the matter by saying: "The testimony of the gripman shows that he discovered the deceased was staggering, and did not know what he was doing, when at least five or six feet from the track. It was his duty, under these circumstances, to have at once taken precautions to prevent the collision. He should not have deferred action until the deceased had placed himself in a dangerous position, when it was manifest to him that he was heedlessly staggering into it. This principle, dictated as it is by common humanity, was recognized by the gripman, for he says that on seeing that deceased was paying no attention, and did not seem to know what he was doing, he immediately warned him of the danger, and used all possible efforts to avoid injuring him. Now, it will be seen that the instruction, which only required the gripman to attempt to avoid injuring deceased 'after he had put himself in danger,' fell short of declaring the whole duty required of him in the circumstances. The primary object of this instruction was, evidently, to inform the jury as to the care required by deceased himself. So far as the instruction was confined to this purpose, the law was correctly given, but it did not declare the duty of the gripman as hereinbefore announced. The jury could have drawn no other conclusion from the instructions than that the gripman, though seeing that deceased was staggering, was paying no attention, and was not going to stop, was still under no obligation to avoid striking him until 'after he had put himself in danger.'"

In *Baird v. Railroad Co.*, 146 Mo. 265, 48 S. W. 78, one of the acts of negligence charged was a failure to keep a proper lookout for the child as he was approaching the track, and Burgess, J., said:

"It was the duty of defendant's employees in charge of the cars to keep a lookout along its track where persons were likely to be found; and if the motorman might, by having his attention on the street in front of the cars,

have discovered, in time to stop the car, that the child was about to cross the track, or if, after discovering his danger, he failed to give the usual signals to warn him of the car's approach, he was guilty of negligence."

In *Livingston v. Railroad Co.*, 170 Mo. 452, 71 S. W. 136, the plaintiff's instructions authorized a recovery if the defendant's engineer "saw the perilous position of the child upon the track, or about to place itself in a perilous position upon the track." The defendant's instructions, on the other hand, told the jury that the defendant was not liable unless the child was upon the track and in a position of peril, and omitted the other hypothesis of the child being about to be placed in a position of danger; and it was argued there, as it is here, that the defendant was not liable unless it was guilty of negligence after the child was actually on the track, and not if it was only about to be placed in a position of peril; and counsel there argued that "the child was in no danger at all until it got upon our track." There was a verdict for defendant in the lower court, and this court reversed that judgment because the defendant's instructions were erroneous, saying that they were predicated upon rules applicable to persons of mature years, but were wholly inapplicable to a child of three and one-half years. The gripman in this case saw, or could have seen, this child approaching the track, and about to be placed in a position of danger, or, more properly speaking, running into inevitable danger and death, in ample time to have stopped the car and have averted the injury, and it was negligence for him not to do so.

3. The plaintiffs next assign as error the exclusion of a question asked the plaintiffs' witness Hite. The witness Hite was an ex-gripman, who had worked on the defendant's road, knew its cars, and the locality where the accident occurred. In response to questions by plaintiffs' counsel he had stated that the car could have been stopped on the level of Twenty-third street in six to ten feet in an emergency. The defendant's counsel then asked whether it would make any difference if the attempt to stop the car was on the down grade of 6.4 per cent. south of Twenty-third street. Plaintiffs' counsel objected to the question on the ground that his position is that the stop should have been made before the front of the car reached the down grade, and

while the car was still on the level ground; that is, before the car reached the south crossing on Twenty-third street. The court sustained the objection, and the defendant excepted, and now assigns this ruling as error. Counsel for the defendant overlook the fact that on the next day of the trial the court permitted them to fully examine this same witness touching this same matter, and that the witness testified that it would make no difference that the stop was to be made on that slope, nor would it make any difference whether the car was empty or loaded. This cured the error, if any, in the ruling complained of.

Counsel for defendant also assign as error the hypothetical question put to the plaintiffs' expert as to the space within which the car could be stopped, and argue that it did not embrace the conditions as to whether the car was empty or loaded, nor did it take into account the safety of the other passengers on the car. The witness was afterward interrogated by the defendant as to whether the car being empty or loaded would make any difference, and he said it would not. So that, even if that was a proper element to be embraced by the hypothetical question, it is harmless error in this case. The record shows only one passenger on the car, and his safety does not appear to have been seriously jeopardized, for he appeared as a witness for the defendant. If there were other passengers on the cars, that fact does not appear. Neither was there anything in the manner adopted or provided for the running or stopping of this car, which suggests to the ordinary mind the possibility of danger to the other passengers, however quickly it was possible to stop this cable car. Such cars are unlike electric cars, where the current can be reversed and the stop effected so suddenly as to cause danger to other passengers; and they are also unlike steam cars, where the engine can be reversed and the air brakes applied so vigorously as to cause like danger. There was no reversible error in these rulings, nor have any been pointed out or discovered in the record.

The judgment is clearly for the right party, and it is affirmed. All concur.

Haley v. St. Louis Transit Co.

(Missouri—Supreme Court, Division No. 1.)

PASSENGER CARRIED BEYOND DESTINATION;¹ INJURY BY FALL ON ICY SIDEWALK WHILE RETURNING.—The plaintiff, a passenger on one of the cars of the defendant, was carried beyond her destination, and while walking back from the place where the car stopped to the place where she desired to alight she fell upon an icy sidewalk and was severely injured. It was held that the negligence of the defendant in carrying her beyond her destination was not the proximate cause of the injury, and that the plaintiff could not recover.

APPEAL by plaintiff from judgment for defendant. Decided December 23, 1903. Reported 179 Mo. 30, 77 S. W. 731.

Lyon & Swarts and Chas. M. Polk, for appellant.

Boyle, Priest & Lehmann and Geo W. Easley, for respondent.

Opinion by BRACE, P. J.

This is an action for damages for personal injuries sustained by the plaintiff in consequence of a fall upon a sidewalk in the city of St. Louis. The defendant objected to the introduction

1. **Termination of status of passenger.**—Generally speaking the relation of carrier and passenger terminates when the passenger has had a reasonable opportunity to leave the car at the place where his journey ends and passengers are discharged. *Chicago Ter. Trans. R. Co. v. Schmelling*, 99 Ill. App. 577, affirmed, 197 Ill. 619, 64 N. E. 714. One who steps from a street railway car to the street is not upon the premises of the railway company, but in a public place where he has the same rights as every other occupier, and over which the company has no control. His rights are then those of a traveler upon the highway and not those of a passenger. *Creamer v. West End St. Ry. Co.*, 4 Am. Electl. Cas. 476, 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490.

Passenger carried beyond destination; proximate cause.—The duty doubtless rests upon a carrier to deliver its passenger safely at the desired destination. *Nellis Street Railroad Accident Law*, p. 111. If a passenger is carried beyond his destination and landed in a dangerous place, because of which the passenger is injured, the company may be liable for negligence. *Henry v. Grant St. Elec. R. Co.*, 24 Wash. 246, 64 Pac. 137. But the cases in which street railway companies have been held liable for injuries resulting from carrying passengers beyond their destination have arisen where such pas-

of any evidence under the petition on the ground that it did not state facts sufficient to constitute a cause of action. The objection was overruled, and evidence introduced by plaintiff, at the close of which the court, at the request of the defendant, instructed the jury "that under the pleadings and the evidence in this case the plaintiff is not entitled to recover, and your ver-

sengers were permitted or invited to alight at unsafe places, resulting in injuries received by the passengers in the act of alighting, or in going from the place where they alighted to a safe place in the street or highway. For instance, where a passenger was carried a short distance beyond a street crossing and was injured in stepping upon a loose stone in going from the car to the sidewalk, it was held that the failure of the conductor to stop his car exactly at the crossing did not of itself constitute actionable negligence. *Conway v. Lewiston & A. R. Co.*, 90 Me. 199, 38 Atl. 110; *Foley v. Brunswick Traction Co.* (N. J.), 50 Atl. 340. And where a street car is stopped beyond a crossing at a place where the carrier has exclusive control, and a passenger is injured in attempting to alight, by the embankment giving way, not being cautioned as to the security of the footing, the act of the conductor in stopping the car at such a place is an implied invitation to the passenger to alight, and an implied representation that it is a proper place for that purpose, and the company is liable. *Joslyn v. Milford, etc., Ry. Co.*, 1 St. Ry. Rep. 323, (Mass.) 67 N. E. 866. But if the injury to a passenger is caused by a defect in a highway or street, for which the street railway company is in no wise responsible, the fact that the passenger was carried beyond his destination and it was thus made possible for him to be subjected to the dangers from such defect, the company cannot be held liable for the injury because the defect was the proximate and direct cause of the injury. See *Dressler v. Citizens' St. R. Co.*, 19 Ind. App. 333, 47 N. E. 651; *White v. West End St. R. Co.*, 165 Mass. 522, 43 N. E. 298. The rule is that, although a situation may be produced by negligence, it is only for injuries which, probably, naturally or necessarily flow from such negligence, without the intervention of another and a distinct cause or agency, that the author of the negligence can be held liable; this would exclude injuries resulting from another, subsequent, different, and independent cause. *Roedecker v. Metropolitan St. Ry. Co.*, 2 St. Ry. Rep. 801, 87 App. Div. (N. Y.) 227, 84 N. Y. Supp. 300. Though it is a general rule that if subsequently to the original negligent act a new cause intervenes, of itself sufficient to cause the misfortune, the former must be considered as too remote, while, if the character of the intervening act was such that its probable or actual consequence could reasonably have been anticipated by the original wrongdoer, the causal connection is not broken, and the original wrongdoer is responsible for all the consequences resulting from the intervening act. *Southern Ry. Co. v. Wevv*, 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109. See also *Nellis Street Railroad Accident Law*, pp. 24-35.

dict must be for the defendant." Thereupon plaintiff took a nonsuit with leave, and thereafter, her motion to set the same aside, duly filed, having been overruled, she appealed, and assigns for error the giving of defendant's instruction in the nature of a demurrer to the evidence.

The case made by the plaintiff's evidence is substantially as follows: The plaintiff at the time of the injury was a dress-maker, sixty years of age, weighing 170 pounds, and resided at 1017 North Garrison avenue — the southwest corner of Garrison and Easton avenues. She was in perfect health, and, in the language of one of her witnesses, "was robust, tall, proud, well dressed, had style about her, and earned \$2 a day making dresses." On the 30th of December, 1899, about 10 o'clock at night, the plaintiff boarded the west-bound Easton avenue car of the defendant at the crossing of Eighteenth street and Franklin avenue for the purpose of returning to her home at the southwest corner of Garrison and Easton avenues. As the car was approaching Garrison avenue, where she desired to alight, she pushed the button and rang the bell twice, once before the car reached the street next east of Garrison avenue, and again, when the car was a short distance east of Garrison avenue; but the car did not stop until it reached the next street — Cardinal avenue — one block west of Garrison avenue. When the car stopped she went to the door, "fussed" with the conductor, who was on the platform outside, for not stopping, got off the car on the north side, went to the north sidewalk of Easton avenue, and was walking east toward Garrison avenue and her home on that sidewalk, when she fell, and thereby sustained an intracapsular fracture of the femur, or a broken bone of the neck of the hip. The injury is serious and permanent. It further appeared from the plaintiff's evidence that on the 30th of December, 1899, the maximum temperature in St. Louis was thirteen, the minimum seven, and that there was a half inch of snow on the ground that evening, and the weather clear; that the snow fell principally on December 27th, on which day the fall was one and three-tenths inches; that the snowstorm on the 27th of December was general throughout the city, and there was no snow fall after 10:35 A. M. of that day; that the maximum temperature on that day was

twenty-four and the minimum eighteen, and on the 28th the maximum was twenty-six and the minimum fifteen, and on the 29th the maximum was nineteen and the minimum eleven. The evidence further tended to show that the night of the 30th of December, although clear, was dark; that there was more light at the Garrison avenue crossing than there was at the Cardinal avenue crossing; that the sidewalk on which plaintiff was walking was covered with snow and ice, was slippery, was shaded by trees growing thereon, and that the stores along it were all closed, and that such was the condition at the place where she fell, which was about half way between the two streets.

The evidence for the plaintiff made a *prima facie* case of negligence againsts the defendant, in that its servants failed to stop the car at Garrison avenue, in compliance with plaintiff's timely signal therefor, given in the manner and by the means provided by the defendant for that purpose, and the only question presented by the record is, was such negligence the proximate cause of the injuries for which she seeks to recover damages in this action? The learned counsel for the plaintiff contend that it should be so held, and cite many cases in support of this contention. We have carefully examined all of these cases, and find that each of them is easily distinguishable from this case, and have found none in which a defendant has been held liable in circumstances like those of the case in hand. As was said by Mr. Justice Miller in *Insurance Co. v. Tweed*, 7 Wall. 44 (loc. cit. 52), 19 L. Ed. 65: "It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain, after all, to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations." In the opinion of Mr. Justice Strong in *Milwaukee, etc., Ry. Co. v. Kellogg*, 94 U. S. 469 (loc. cit. 475), 24 L. Ed. 256, may be found perhaps as brief, and yet as comprehensive, an expression of the rule as can well be given. The learned justice there says: "The question always is, was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural

whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." There was no wanton wrong in this case. The negligence consisted simply in a failure to stop the car, in obedience to the plaintiff's signal, at the crossing nearest to her residence, in consequence of which she was carried to the next crossing, one block farther west, where, of her own volition, she left the car in safety. This was the negligence and the immediate and proximate consequence thereof. The plaintiff, after safely alighting at the crossing, in returning to the crossing at which she intended to alight, fell on the sidewalk leading from the one to the other. The injury she received was the result of such fall. The evidence tended to prove that the immediate cause of her fall was the slippery condition of the sidewalk, and that condition may be said to have been the proximate cause of her injury, and thus the causal connection between the negligence complained of and the injury received was broken by the independent and voluntary act of the plaintiff in leaving the car at the crossing one block west of the crossing where she intended to alight. Even if we can go back of the slippery condition of the sidewalk, which was the immediate cause of the injury, to that voluntary act of the plaintiff must the injury be attributed, unless such act and the injury resulting therefrom were the probable consequence of the negligent act of the defendant, and ought to have been foreseen by its servants in the light of the attending circumstances. It may be conceded that the act of the plaintiff in getting off at the next crossing, and in returning by the sidewalk toward the crossing which had been passed, were probable consequences of the negligence of defendant in failing to stop the car at the crossing for which she signaled, which ought to have been foreseen. But it does not at all follow that the accident which befell the plaintiff was one which, in the

light of the attending circumstances, ought to have been foreseen by defendant's servants as the probable consequence of plaintiff's walking thereon with due and proper care. Such accident was not the natural and usual sequence of such a walk under such circumstances. The natural and usual sequence of the walk of an ordinarily prudent adult person in perfect health and of a robust constitution as plaintiff was, whether that walk be long or short, whether by day or night, whether in weather cold or hot, on the improved sidewalks of a city in good repair, in its much traveled thoroughfare as this sidewalk was, is that such persons safely arrive at their destinations. Persons sometimes fall on these sidewalks and are injured, but these are unusual and extraordinary occurrences not to be expected or foreseen. If the sidewalk is defective, so as not to be reasonably safe, by which a pedestrian thereon in the exercise of due care is injured, the city is liable for damages. If he is injured by obstructions or dangers created therein by another, such other person is liable therefor, and the city may become so. But in neither event is the pedestrian thereon, or he who may have caused him to become such, in fault. The defendant in this case was charged with no other or different duty in regard to the sidewalk in question than was the plaintiff herself. The fact that by reason of climatic conditions, or other natural causes, the sidewalk may have been in less safe condition than usual, in no way changes the relative rights, duties, or obligations of the parties. Such conditions only impose the necessity of being more cautious when walking thereon. Pedestrians exercising due care sometimes fall and are injured while walking on the public sidewalks under such conditions, but such occurrences are unusual and extraordinary, and not to be anticipated or foreseen. For support of their contention plaintiff's counsel seem to rely more upon the *dicta* contained in some of the opinions in the cases cited than upon the facts in judgment in those cases. Most of them are steam railroad cases, in which, in violation of the carrier's contract, the passenger was put off the car on the carrier's track in a dangerous situation, from which his injuries directly resulted, or at a distance from his destination, which he could only reach by pursuance

of a dangerous way on or along its tracks, and in which was located a peril known to the carrier, and which the passenger must encounter, and from which his injuries resulted. We find no difficulty in differentiating the case in hand from all the cases cited on the facts in each, and only in the facts in each case can the *dicta* in each be fully appreciated and rightly understood. We have neither time nor space for an adequate review of all those cases, nor do we deem it necessary, since no better rule could be deduced therefrom on the vexed question of proximate cause, as applicable to the facts in this case, than that already laid down, and under which it seems evident that the defendant's negligence was not the proximate cause of the plaintiff's injury.

The judgment of the Circuit Court is affirmed. All concur.

Petty v. St. Louis & Meramec River Railroad Co.

(Missouri — Supreme Court, Division No. 1.)

1. **EXCESSIVE RATE OF SPEED.**¹—In the absence of a statute or ordinance regulating the rate of speed of street cars it is not negligence *per se* for a car to run on a grade at the rate of fifteen miles an hour, and as it approaches a street intersection at a rate of eight or ten miles an hour, in a portion of a city which is thinly settled and upon a street which is little used.
2. **DUTY OF MOTORMAN TO AVOID COLLISION.**—It was contended by the plaintiff that the motorman saw or by the exercise of ordinary care might have seen that the plaintiff was in a position of imminent peril in time to have stopped or checked the car, and to have averted the injury. The plaintiff testified that when they reached the street intersection where the collision occurred they stopped, looked, and listened, and did not see or hear a car approaching. The car had a headlight which lit up the track for from fifty to seventy-five feet in front of the car. There was no light upon the wagon in which the plaintiff was riding. It was held that if it was true that the plaintiff could not see a well-

1. As to negligent rate of speed, see cases cited in note to Warner v. St. Louis & Meramec R. Co., *ante*, page 520. As to duty of motormen to avoid collision, upon seeing a person upon or near the track in imminent peril, see note to Harrington v. Los Angeles St. Ry. Co., *ante*, p. 23.

lighted car within a distance of 1,200 feet, it could not be said that the motorman could see the wagon in which the plaintiff was riding. But even if the motorman could have seen the plaintiff, he had a right to assume that the plaintiff could also see the car, and that the plaintiff would stop before getting into a position of peril; the evidence completely disproved the plaintiff's contention that she was in a position of imminent peril and that the motorman saw or might have seen it in time to have averted the injury.

APPEAL by defendant from judgment for plaintiff. Decided February 10, 1904. Reported 179 Mo. 666, 78 S. W. 1003.

McKeighan & Watts and Robt. A. Holland, Jr., for appellant.

R. L. & John Johnston, for respondent.

Opinion by MARSHALL, J.

This is an action for \$20,000 damages for personal injuries sustained by the plaintiff on November 29, 1899, at the intersection of Longfellow and Plant avenues, in the town of Webster Groves, by reason of a collision between one of defendant's cars and an open wagon in which the plaintiff and her brother were riding. There was a judgment for the plaintiff for \$2,000, and defendant appealed.

The negligence charged in the petition is as follows:

"Plaintiff alleges as the specific facts constituting the said negligence of defendant that at the time and place of said collision defendant's said electric car was being run by its said agents and employees at a rapid and dangerous rate of speed, on a descending grade; the night was growing dark, but said car carried no headlight; no bell was sounded and no warning of any kind given of the approach of said car until too late to enable plaintiff and her said brother to escape said collision; that defendant's agent and motoneer in charge of said car saw, or by the exercise of ordinary care would have seen, the danger and peril of the plaintiff in time to have stopped or so have checked the speed of said car as to avoid said collision, but failed to either stop or check the speed of said car."

The answer is a general denial and a special plea that the plaintiff and her brother were guilty of contributory negligence.

The case made is this:

Longfellow avenue runs east and west, and Plant avenue runs north and south. The defendant has an electric street railroad on Longfellow avenue. The cars run west on the tracks on the north side of the street, and east

on the tracks on the south side of the street. From the south track to the south side of Longfellow avenue at Plant avenue it is twenty-two feet. From Plant avenue, looking westwardly, Longfellow avenue is perfectly straight for a distance of 1,200 feet, and the grade rises three and one-half feet to the hundred. The plaintiff, her mother, two sisters, and her brother raised vegetables on a farm south of Webster Groves, and she and her brother sold the same to residents of Webster Groves, going into town two or three times a week. On the day of the accident the plaintiff, a woman twenty-three years of age, and her brother, two years younger, were driving north on Plant avenue, in an open wagon, in the evening between dusk and dark. When they reached Longfellow avenue, she and her brother say they stopped with the horse on Longfellow avenue and the wagon just south thereof. They say that while in that position they could see west on Longfellow avenue at least a block. There were no houses on that side of Longfellow avenue, and nothing to obstruct their view for at least 1,200 feet. They say they looked and listened, and could neither see nor hear any car approaching. They then started the horse forward, and when the horse and the fore wheels had gotten across the south track they saw a glimpse of light, and looked, and saw a car right upon them; that the brother grabbed the whip, but before the wagon could clear the track, the car struck the hind wheel of the wagon, and she was thrown out and injured. They say they saw no car, saw no headlight on the car, and heard no bell rung, and heard no noise of an approaching car.

George W. Leming testified for the plaintiff that he lived in Webster, and was engaged in the express business; that he was driving west on Lockwood avenue toward Plant avenue, and when he reached Plant and Lockwood he saw the headlight of the car coming eastwardly from the raise at the Congregational Church (which was 1,200 feet west of Plant avenue), and that he also saw the plaintiff's wagon was coming north on Plant avenue toward Lockwood avenue; that when he got to the culvert the motorman on the electric car was ringing his bell, and he wondered whether he was ringing for him or the other wagon; that "at that time the plaintiff's horse was close to the mouth of Plant avenue." Over the objection of the defendant that he had not shown himself qualified to speak, this witness was permitted to testify that the car was running at the rate of twenty-five miles an hour, but he said he could not say whether it was running faster or slower than the cars usually ran at that point. He further testified that he saw the headlight burning on the car, and that when he passed Plant avenue the plaintiff's wagon was fifteen or twenty-five steps from Lockwood avenue, and that the car was in the neighborhood of from fifty to seventy-five feet west of the culvert; that anybody coming into Lockwood avenue could see a car for about 400 or 500 yards, and sometimes even farther than that; that he did not notice any slackening of the speed before the collision; that when the motorman began to ring the gong he kept ringing it. This was all the evidence for the plaintiff outside of the testimony as to the nature and extent of her injuries, as to which the doctors disagreed as to whether

they were simple, and not serious, or were grave, and probably permanent. The defendant demurred to the evidence, the court overruled the demurrer, and the defendant excepted.

Daniel R. Fauste testified for the defendant that he was the motorman of the car; that from the Congregational Church, at the top of the slope, until he got three-fourths of the way down the slope, the car ran at a speed of fifteen miles an hour, but before the car reached Plant avenue it had slowed down to eight or ten miles an hour; that he had no power on going down the slope; that as he went down the slope he sounded the gong, and sounded it more as he approached Plant avenue; that there was a headlight burning on the front of the car; that he did not see the plaintiff's horse and wagon until his car got within about fifteen or twenty feet of Plant avenue; that it was dark, and the horse was not over three or four feet from the track at the time; that he rang his bell loudly, and applied his brakes to stop, and at that time the wagon was driven right rapidly across the track in front of the car; that he applied the brake, and also reversed the current; and that the car ran just its own length, thirty-five to forty feet, after it struck the wagon. On cross-examination he said that he commenced to take up the slack of his brake when about 200 yards west of Plant avenue; that the headlight on the car threw a light about fifty or seventy-five feet in front of it; that going down grade at the rate of ten miles an hour the car could not be stopped in less than about seventy-five feet.

H. O. Rockwell testified for the defendant that he is the assistant manager of the defendant, and is an electrical engineer; that it is 1,200 feet, by actual measurement, from the west line of Plant avenue to the top of the slope, at the Congregational Church, and that the grade is three and one-half feet to the hundred; that it is twenty-two feet from the east-bound track to the south line of Longfellow avenue; that a person coming north on Plant avenue, when he reached the gutter on the south line of Longfellow avenue, could see to the top of the hill at the Congregational Church; that there was nothing to obstruct the view; that a car like the one in question would make considerable noise when coming down the slope.

Mr. Cheatham testified for the defendant that he was driving west on Lockwood avenue, and was about 150 feet east of Plant avenue when the collision occurred; that he saw the car coming down the slope, and saw the headlight; that the car stopped before it got to where he was, and he thinks it stopped five or six feet from where the accident happened.

T. L. Murrier testified for the defendant that he was the conductor of the car; that the car ran down the slope at a speed of fifteen miles an hour; that the gong was sounded constantly as the car went down the slope; that the sounding of the gong and the reversal of the current attracted his attention; that the headlight was burning on the car, and was broken by the collision; that the car did not run more than its own length after striking the wagon.

This was all the evidence in the case. The defendant again demurred to the evidence, the court overruled the demurrer, and the defendant excepted.

The plaintiff's instructions predicated a right to recover upon a negligent rate of speed of the car, and upon the proposition that the defendant's servants saw or might have seen that the plaintiff was in a position of imminent peril in time to have stopped or checked the car, and to have averted the accident, and negligently failed to do so. There was a verdict for \$2,000. This court has jurisdiction because the constitutionality of the nine-jury law was called in question, but, as that question has been settled, it is not necessary to refer to it here.

1. The plaintiff bases a right to recover upon the rate of speed at which the car was run. No law or contract regulating the rate of speed of the defendant's cars was shown. The common law, therefore, applies. One witness for the plaintiff put the speed at twenty-five miles an hour, but, as he did not show himself qualified by training or experience to speak to that question, his testimony need not be further considered. The only evidence in the case is that the car ran down the slope at the rate of fifteen miles an hour, and that when it approached Plant avenue it was slowed down to a speed of eight to ten miles an hour. On the face of the case, such a rate of speed at the time and place and under the circumstances of this case cannot be held, as a matter of law, to amount to negligence. There were no houses on the south side of the street for about 1,200 feet west of Plant avenue, and, so far as appears, there were no intersecting streets. The track was straight, and there was nothing to interfere with the view for that distance. Any one standing in the gutter at the intersection of Longfellow and Plant avenues, which was twenty-two feet south of the east-bound track, could see westwardly for 1,200 feet. The car was lighted by electricity, and had a headlight burning. The car made considerable noise running down the slope, and the gong was sounded. Any one who had looked could have seen and heard the car coming. Under such circumstances a rate of speed of fifteen or even twenty-five miles an hour, does not *per se* constitute common-law negligence. There was, therefore, no basis for a recovery upon such a theory, and the plaintiff's first instruction, which authorized a verdict upon that theory, was clearly erroneous.

2. The second contention of the plaintiff is that the operator of the car saw, or by the exercise of ordinary care might have

seen, that the plaintiff was in a position of imminent peril, in time to have stopped or checked the car, and to have averted the injury. The argument of the plaintiff is that the track was straight for 1,200 feet; that the headlight lit up the track for fifty to seventy-five feet in front of the car; that, therefore, the operator of the car could have seen that the plaintiff was crossing the track, and was in imminent danger, when the car was seventy-five feet distant from the wagon, and that the car could have been stopped, or at any rate its speed could have been checked, so as to avoid the collision. But if all this be conceded, it would not follow that the plaintiff was entitled to recover, for it is equally true that, if the operator of the car could have seen the plaintiff's wagon when 1,200 feet distant, the plaintiff could have seen the car at the same distance. The car was lighted by electricity, and had a headlight. The wagon was not lighted at all. The plaintiff could have seen the car much more easily and distinctly than the operator of the car could have seen the wagon. Yet the plaintiff and her brother swear that when they reached the intersection of Plant avenue and Longfellow avenue, and when their horse had gone onto Longfellow avenue and the wagon was still on Plant avenue, they stopped, looked, and listened, and that they neither saw nor heard a car coming. They were then within twenty-two feet of the track, and could see 1,200 feet up the track toward the west. If this is true, and if they could not see a well-lighted car with a headlight within 1,200 feet of them, by what manner of reason can it be said that the operator of the car could see them and their wagon that was not lighted? But if the operator of the car could have seen the plaintiff at that time and distance, he had a right to assume that the plaintiff could and would also see the car, and that the plaintiff would stop before getting into a position of peril; and certainly at that time the plaintiff was not in a position of peril, for her wagon was twenty-two feet south of the track.

The plaintiff says that, having thus stopped, looked, and listened, and neither seeing nor hearing a car coming, she proceeded to cross the track; that she was riding in an open wagon, and that she did not look again until the horse and front wheels

of the wagon had cleared the north rail of the east-bound track, and while the rear wheels of her wagon were on the track, and then she saw "a glimpse of light," and looked toward the west, and saw the car right upon them, and in an instant the collision occurred. She also says she saw no headlight and heard no bell rung, although her own witness Leming, and four other witnesses for the defendant, testify that there was a headlight burning on the car, and that the gong was being loudly sounded. The plaintiff's contention is that, as the headlight lit up a space of fifty or seventy-five feet ahead of the car, the motorman could have seen the plaintiff's wagon on the track, and could have seen the imminent danger of the plaintiff when seventy-five feet distant from the wagon, and could have stopped or checked the speed of the car in time to avert the collision, and did not do so. Several conclusive answers to this contention are apparent. In the first place, there is no evidence at all that the motorman failed to stop the car or check its speed after he saw or might have seen the imminent peril of the plaintiff. On the contrary, all the testimony is that he applied the brakes, and reversed the current, and sounded the gong loudly and continuously, and did everything that could be done. It is true that the plaintiff's witness Leming said that he did not notice that the speed of the car was checked, but he also testified that when he got to the culvert, which was twenty-five feet west of Plant avenue, the car was fifty to seventy-five feet west of the culvert, and that the "plaintiff's horse was close to the mouth of Plant avenue." So that, if this witness' testimony is to control the case, the plaintiff was at least twenty feet distant from the track when the car was 75 or 100 feet west of Plant avenue, and, therefore, the plaintiff was not in a position of imminent peril at that time, and there was no obligation resting upon the motorman to stop or check the speed of the car; but this witness said he was ringing his bell, and he wondered whether he was ringing it for him or the other wagon. If absolute credence be given, therefore, to everything this witness said, it should be shown that the motorman did all he was obligated to do, and that the plaintiff was not in any danger whatever, and was not on the track at all when the car was within

75 or 100 feet of the place of collision. The testimony of this witness, therefore, completely disproves the plaintiff's contention that she was in a position of imminent peril, and that the motorman saw it, or might have seen it, in time to have averted the injury. And, on the contrary, the testimony of this witness corroborates the testimony of the motorman that when the car was within less than seventy-five feet of Plant avenue the plaintiff drove on the track, and, this being so, and under the uncontradicted testimony that the car could not have been stopped in less than seventy-five feet on that grade when running eight or ten miles an hour, this contention of the plaintiff utterly fails. Moreover, if the testimony of the plaintiff be true that she stopped and looked west when she reached the south side of Longfellow avenue, and did not see a car coming, it is incomprehensible how a collision could have occurred. For this involves the deduction that a car ran 1,200 feet while the plaintiff's wagon was going twenty-two feet from the south rail of the east-bound track to the south line of Longfellow avenue and the width of the track, say about five feet. In other words, that a car traveled 1,200 feet while the wagon was traveling twenty-seven feet. This would require the car to travel a little over forty-four times as fast as the wagon. If the car was traveling fifteen or twenty-five miles an hour, and the wagon was traveling only one mile an hour, the car would be traveling fifteen or twenty-five times as fast as the wagon. And even assuming that the car was traveling twenty-five times as fast as the wagon, the car would only travel 675 feet while the wagon was traveling twenty-seven feet. This extreme concession as to the rate of speed that the car and the wagon were respectively traveling shows that when the plaintiff's wagon reached the south line of Longfellow avenue, or at any rate when the wagon began to move from that point, the car was within 675 feet of the point of the collision. This being true, it cannot mathematically be true that the plaintiff could not see the car coming, for she had an unobstructed view toward the west of 1,200 feet, and the car was big, and lighted by electricity, and had a headlight, and, if she had looked, she could not have failed to see the car; and under these circumstances she cannot be heard to say she did not see the car in ample time

to have stopped before she got into a position of peril, and it was contributory negligence on her part not to do so, which bars her recovery. *Guyer v. Railroad Co.*, 174 Mo. 344, 73 S. W. 584; *Carroll v. Transit Co.*, 107 Mo. 653, 17 S. W. 889; *Boyd v. Railroad Co.*, 105 Mo. 371, 16 S. W. 909; *Butts v. Railroad Co.*, 98 Mo. 272, 11 S. W. 754; *Henze v. Railroad Co.*, 71 Mo. 636; *Jennings v. Railroad Co.*, 112 Mo. 268, 20 S. W. 490; *Maxey v. Railroad Co.*, 113 Mo. 1, 20 S. W. 654; *Sullivan v. Railroad Co.*, 117 Mo. 214, 23 S. W. 149; *Kelsoy v. Railroad Co.*, 129 Mo. 362, 30 S. W. 339; *Moberly v. Railroad Co.*, 98 Mo. 183, 11 S. W. 569. The plaintiff made out no case, and the demurrers to the evidence should have been sustained.

The judgment is reversed. All concur.

Roefeldt v. St. Louis & Suburban Railway Co.

(Missouri — Supreme Court, Division No. 1.)

1. COLLISION WITH VEHICLE; FAILURE TO STOP BEFORE CROSSING; CONTRIBUTORY NEGLIGENCE.¹—The plaintiff, in attempting to drive across the tracks of the defendant at a street intersection, was struck by one of the defendant's cars and thrown from his wagon and injured. It appeared that he was driving down a street which was at a grade of about 3 per cent. His horse approached the crossing at a slow walk. He saw the car approaching at a distance of about 250 feet, but did not stop before going upon the track. It was held that he was guilty of contributory negligence.

1. Driving upon track in front of approaching car.—A person who attempts to drive across the street in front of an electric car which he sees approaching, thinking that he can safely cross, with the result that there is a collision when the front wheels of his wagon are on the track, is guilty of contributory negligence. *Tyson v. Union Traction Co.*, 199 Pa. St. 264, 48 Atl. 1078. A driver is, as matter of law, guilty of contributory negligence precluding recovery for injuries received in a collision with an electric car, in acting upon the assumption that, if he reached the crossing first, he was entitled to go on, and that the duty of avoiding a collision rested entirely with the motorman, and, with a full knowledge of the situation, placing himself in a position of manifest danger. *Smith v. Electric Tract. Co.*, 187 Pa. St. 110, 40 Atl. 966. Driving at a walk across an electric street railway track com-

2. **DUTY OF MOTORMAN TO AVOID COLLISION.**—The car was approaching the street intersection where the accident occurred at a rate not exceeding nine or ten miles an hour. The evidence was conflicting as to the distance of the car when the plaintiff drove upon the track. The plaintiff saw the car approaching, but nevertheless attempted to cross ahead of it. In view of this evidence it was held that the motorman could not be charged with negligence in concluding from the situation of the parties that the plaintiff could cross the track before the car struck him; there was nothing in the evidence tending to show that the motorman could have stopped the car in time to have prevented the collision after the plaintiff had put himself in a position of peril.

APPEAL by defendant from judgment in favor of plaintiff. Decided March 17, 1904. Reported (Mo.), 79 S. W. 706.

McKeighan & Watts and Robt. A. Holland, Jr., for appellant.

Wm. R. Gentry, for respondent.

Opinion by VALLIANT, J.

Plaintiff was driving in a wagon along Twentieth street crossing in the tracks of defendant's street railroad at the intersection of Twentieth and Wash streets, when his wagon was struck

stitutes contributory negligence, when the driver has seen a car approaching very fast, on a down grade, although he continues to proceed slowly across the track on the theory that the car will stop on the nearest side of the street. *Smith v. Electric Traction Co.*, 6 Pa. Dist. Rep. 471.

Illustrative cases.—It is negligence to drive in front of a car which at the time is less than a block away. *Rohe v. Third Ave. R. Co.*, 10 Misc. Rep. (N. Y.) 740, 31 N. Y. Supp. 797. And also in front of a car approaching at a rate of twenty miles an hour, a block distant from the crossing. *Goodman v. West Chicago St. Ry. Co.*, 101 Ill. App. 470; *Seggerman v. Metropolitan St. Ry. Co.*, 38 Misc. Rep. (N. Y.) 374, 77 N. Y. Supp. 905. And also to attempt to cross a track when a car moving twenty miles an hour was seventy-five feet away. *Chicago N. S. St. R. Co. v. McCarthy*, 66 Ill. App. 667. A truckman attempting to drive across a track in front of an electric car which was only fifty or seventy-five feet away is guilty of contributory negligence. *Clancy v. Troy & L. R. Co.*, 88 Hun (N. Y.), 496, 34 N. Y. Supp. 877. It is negligence *per se* to drive across a track in front of a cable street car approaching in full view within a distance of forty feet, at a speed of ten miles an hour. *Hamilton v. Third Ave. R. Co.*, 6 Misc. Rep. (N. Y.) 382, 26 N. Y. Supp. 754. Driving at a walk diagonally across a street and near a street intersection, while an approaching car is only 150 feet away, without notifying the motorman of an intention to cross, is negligence. *Meyer v. Brooklyn Hts. R. Co.*, 9 App. Div. (N. Y.) 79, 41 N. Y. Supp. 92.

by a car of defendant, and he was thrown out and received injuries. This suit is to recover damages for these injuries. The petition alleges that the defendant negligently caused its car to collide with the wagon, and that the defendant's servants in charge of the car saw, or by the exercise of ordinary care could have seen, "the plaintiff as he was crossing Wash street, and as he approached said track, and after he drove the horses on the track, and saw, or by the exercise of ordinary care could have seen, the plaintiff after he was in a position of peril, and by the exercise of ordinary care could have avoided striking said wagon and injuring plaintiff after his position of peril was known to defendant by its agents and servants in charge of said car, or could by the exercise of ordinary care have been known," etc., yet they failed to exercise such care, and that failure contributed to cause the injuries of which the plaintiff complains. The petition then sets out the city ordinance requiring that the servant of a street railroad company in charge of a car "shall keep a vigilant watch for all vehicles and persons on foot, especially children, either on its track or moving toward

Where the driver of a wagon, while in plain view of a street car approaching at a speed of from eight to twelve miles, which is shown to be the usual rate, and when within 130 feet of the car hurriedly attempts to cross in front thereof, and a collision occurs, the driver is guilty of contributory negligence precluding recovery. *Watermelon v. Fox River Elec. R. Co.*, 110 Wis. 153, 85 N. W. 663.

In the case of *Ledwidge v. St. Louis Transit Co. (Mo.)*, 73 S. W. 1008, it appeared that the plaintiff saw a car about 150 feet away, approaching at a speed of twenty miles an hour, but did not stop or whip up his horses until the car was within forty or fifty feet from him, and it struck his hack before he got across the track and injured him; it was held that he had no right to assume that those in charge of the car would regulate its speed to conform to an ordinance limiting the speed of street cars, and that he was guilty of contributory negligence.

It is not contributory negligence as a matter of law for a driver to attempt to cross a street railroad track at a slow trot, after observing, when five yards from the track, a street car approaching at a distance of 200 yards. *Shanley v. Union R. Co.*, 14 Misc. Rep. (N. Y.) 442, 35 N. Y. Supp. 1030; *Hunter v. Third Ave. R. Co.*, 21 Misc. Rep. (N. Y.) 1, 46 N. Y. Supp. 1010; *Mackee v. Brooklyn City R. Co.*, 10 Misc. Rep. (N. Y.) 4, 30 N. Y. Supp. 539. Attempting to drive a wagon across street car tracks when a trolley car was more than seventy-five feet away, and could have been stopped within one-fifth

it, and on the first appearance of danger to such persons or vehicles the car shall be stopped in the shortest time and space possible;” and states that the servants of the defendant on this occasion failed to perform the duty required by that ordinance, and that that failure contributed to the injury complained of. The answer was a general denial and a plea that the plaintiff himself was guilty of negligence which directly contributed to his injuries. Reply, general denial.

The testimony on the part of the plaintiff tended to show as follows:

Twentieth street runs north and south. Wash street crosses it running east and west. Defendant maintains a double-track street railroad on Wash street. The north track is for defendant's west-bound cars, the south track for the cars east-bound. The plaintiff was driving a two-horse team to a wagon loaded with barley. His course was north on Twentieth street. The grade on Twentieth street from south to north is a decline of 3.3 per cent. for a distance beginning forty-five feet south of defendant's south track to that track; then it is level across the two tracks; thence north it is a slight up grade. Going west on Wash street from Nineteenth to Twentieth (as the car in question was going) there was an upgrade of 1.3 per cent. Twentieth street at its intersection with Wash is thirty-six and four-tenths feet wide

of that distance, is not contributory negligence as a matter of law. *Smith v. Metropolitan St. Ry. Co.*, 66 App. Div. (N. Y.) 600, 73 N. Y. Supp. 254; *Bruss v. Metropolitan St. Ry. Co.*, 66 App. Div. (N. Y.) 554, 73 N. Y. Supp. 256; *Lawson v. Metropolitan St. Ry. Co.*, 40 App. Div. (N. Y.) 307, 57 N. Y. Supp. 997, affirmed, 166 N. Y. 589, 59 N. E. 1124. One who on reaching a street crossing sees a car 250 feet distant is not, as a matter of law, guilty of contributory negligence in attempting to drive over the track in front of the car, where he could have done so in safety if it had not been running at an unusual rate of speed. *Callahan v. Philadelphia Traction Co.*, 184 Pa. St. 425, 39 Atl. 222.

The driver of a vehicle approaching a street car crossing is entitled to presume that approaching cars will be moved at that point under a reasonable state of control, so that it might be readily stopped in case of an emergency, to give him an opportunity to get over in safety. *Riley v. Brooklyn Hts. R. Co.*, 65 App. Div. (N. Y.) 453, 72 N. Y. Supp. 1080. So where a driver sees a car approaching a street intersection at a distance of 230 feet, he has a right to rely on the duty resting on the motorman to so manage and control his car as to avoid a collision and not to subject him to unnecessary danger. *Chicago General Ry. Co. v. Carroll*, 91 Ill. App. 356, affirmed, 189 Ill. 273, 59 N. E. 551. See also *Saunders v. City & Sub. R. Co.*, 99 Tenn. 130, 41 S. W. 1031.

from curb to curb. The sidewalk on the east side is twelve feet wide. There is a building in which is a saloon on the northeast corner of these streets, which measures forty-six feet nine inches along the north line of Wash street. The distance between the two tracks is five feet nine inches. Each track is four feet ten inches wide. From the south curb line on Wash street to the south rail of the south track is ten feet three inches. At the southeast corner is a two-story brick house, which is set back twenty-one feet from the south curb. The tracks run straight on Wash street east and west. The plaintiff was familiar with the situation, he had been driving across those tracks at that point several times a day for several months, and knew how the cars usually ran there. The account that the plaintiff himself gave of the accident was as follows: As he approached Wash street he looked to the east, and saw the car coming. It was then 250 feet away, and was coming very rapidly — thirty miles an hour, and increasing in speed until at the moment of the collision it was going sixty miles an hour. He was driving in a slow walk, not to exceed three miles an hour. When his horses' heads were about to go over the north track, the car was fifty or sixty feet from him, he drove steadily along, and had almost cleared the track when the car struck the hind wheels of his wagon and turned it over. "Q. As this car came along, you saw it 250 feet away from you, and you kept right along toward the track, seeing the car coming toward you? A. Yes, sir. Q. Why didn't you stop, and let the car go by? A. I couldn't stop. I was going down hill, and he was going up hill. Q. And you thought the car would stop, and, therefore, you took your chances? A. Yes, sir. Q. Was the car stopping? A. No, sir. Q. You thought it might stop? A. Yes, sir. Q. And still you say the car was coming faster and faster? A. Yes, sir. Q. And yet you crossed in front of it? A. Yes, sir. Q. And when your horses' heads entered on that west-bound track the car was fifty or sixty feet away? A. Yes, sir. Q. When you got to this first track, when you saw that this car was coming faster and faster, why didn't you stop, and let it go by, not drive right in front of it? A. I couldn't stop it any more. Q. Why didn't you drive it in such a way that when you saw a car coming you could stop it? A. There was no brake on the wagon. Q. Why didn't you drive your wagon so that when you saw a car you could stop? A. I couldn't stop it any more. Q. In other words, whenever you drove down there you had had to take your chances? A. I'd been across if they had slacked up anyways, but they still came faster. Q. When you got down here to this crossing, and saw this car, you could have stopped your wagon then? A. It was near the crossing when I saw it. Q. When you got near the crossing, you could have stopped it then? A. Yes, sir. Q. When you saw this car coming sixty miles an hour, why didn't you stop? A. I thought I could get across easy enough. I could have if it slowed up. Q. You thought you could get across? A. Yes, sir. Q. Did you have a brake for that wagon? A. No, sir. Q. When you got to the first track the grade is even? A. Yes, the tracks are about level. Q. And when you get across the tracks the grade goes up? A. Yes, sir." The testimony of the other witnesses in plaintiff's behalf was to the effect that the car was

going at the rate of nine or ten miles an hour. It was admitted by the parties that it was lawful for defendant to run its car at a rate not to exceed ten miles an hour. The testimony for defendant also was that the car was running at the rate of nine or ten miles an hour, and that that was the usual speed of defendant's cars in that part of the city. The plaintiff's witnesses differed in their several estimates as to the distance the car was from the point of contact when the horses of plaintiff stepped on the north track. The estimates ranged from 50 to 108 feet. Nathan Daly saw the collision from the northwest corner of the streets. He said that when the horses reached the south crossing—that is, the crossway from the southeast to the northwest corner—the car was at Nineteenth street, and when the horses reached the north track the car was thirty-five feet east of the east crossing. He also said that at that time there were two men on the front platform—one the motorman, and the other a man who was being taught to be a motorman. When he first saw them, the motorman was standing behind the one who was being instructed, and when the car got within thirty-five feet of the east crossing the front man turned around, and the two began talking, and neither looked to the front. John A. Long, who was a passenger in the car, and was noticing the wagon, estimated that at the moment the plaintiff started to drive over the south track the car was 250 feet distant. When the horses stepped on the north track the car was fifty or seventy-five feet away. “Q. Don't you know that you felt, when the horses went on the track, that there would be a collision? A. Most decidedly. We were all expecting it. Q. You were all expecting it as soon as you saw the horses enter on the track? A. As soon as we saw the horses enter on the track and the car coming at that rate. Q. You knew, when the horses went on the track, that there would be a collision? A. Yes, sir, certainly, at the rate the car was going.” Stahl was standing in the saloon, and witnessed the accident. According to his testimony the horses went upon the north track just as the car had passed the east end of the saloon. Hackett was standing on the northeast corner of the streets; was aiming to cross Wash street, but, seeing the car approaching, waited for it to pass. He said that when he saw the plaintiff approach the crossing from the other side the car was about 200 feet distant, and when the horses were about to step on the north track the car was 108 feet away. He felt sure of this distance, because, after the accident, thinking he might be called to testify, he measured the distance by stepping. Sanders witnessed the accident from inside the house on the northwest corner. He estimated that when the horses were on the north track the car was twenty feet east of the crossing. The car, after striking the wagon, stopped in Twentieth street. Speckmann saw the accident from a point on the northeast corner, and was of the opinion that when the plaintiff reached the south crossing of Wash street the car was 250 feet away, and when the horses' feet got on the north track it was 100 feet away. Whelan, who was the conductor of the car, but was plaintiff's witness, testified that the car approached Twentieth street at its usual rate—about ten miles an hour; that he was standing on the rear platform; that there

were sixty-four or sixty-five passengers in the car; that about midway between Nineteenth and Twentieth streets he heard the gong sound, and felt the reverse applied. He then looked out on the north side, and saw the wagon crossing the track. Plaintiff's testimony also tended to show that a car under the given conditions going at the rate of nine or ten miles an hour could be stopped by the reverse in forty to fifty feet, and by the brake in sixty to seventy-five feet. If it was going faster, the distance in which it could be stopped would be proportionately greater. At twelve miles it could be stopped by the reverse in seventy-five feet. At fifteen, 100 feet, etc., and by use of the brake a proportionately longer space. Plaintiff also introduced in evidence the city ordinance pleaded in the petition, and evidence that the defendant had accepted and agreed to be bound by it.

On the part of defendant the testimony tended to show: That, in addition to the regular motorman in charge of the car was a man named Black, who had served as a motorman for a company in Illinois, but was being instructed in regard to the streets and grades with a view to being qualified to take charge of a car on this line. He had been thus engaged six days, and was ready to take a car. When the car was about 100 feet east of Twentieth street, the plaintiff was driving slowly toward the tracks, and Black sounded the gong. As the team approached the north track, and before entering it, the car was thirty-five or forty feet distant. Black then applied the brakes, and the regular motorman reversed the current. The car slid against the wagon, and stopped just where it struck it. The car was about thirty-five feet long, and weighed fourteen or fifteen tons. There were about sixty passengers aboard. Some of the passengers testified that they heard the violent sounding of the gong, felt the effect of the brakes and the reverse applied, which "threw the people every way;" that the wheels slid on the rails, and there was a perceptible slackening of the speed before the car came in contact with the wagon. The car, under the conditions named, could not have been stopped in a shorter space than seventy-five or eighty-five feet.

At the close of the plaintiff's evidence, and again at the close of all the evidence, the defendant asked an instruction in the nature of a demurrer to the evidence, which the court refused, and exceptions were duly preserved. The cause was submitted to the jury under instructions to the effect that if the jury should find from the evidence that, if the motorman had kept a vigilant watch for vehicles, he would have seen the horses and wagon on the track in danger of being struck by the car, and that if, after so seeing the horses, and seeing the plaintiff in that position of peril, the motorman could, by stopping the car in the shortest time and space possible under the circumstances, have averted the accident, yet failed to do so, the verdict should be for the plaintiff, provided the jury should also find that the plaintiff was himself at the time exercising ordinary care; and that, even though the jury should find that the plaintiff was guilty of negligence in driving on the railroad track as he did, yet if the motorman saw the plaintiff's perilous condition, or by the exercise of ordinary care would have seen it, and knew, or by the exercise of ordinary care would have known, that

the plaintiff was in danger of being injured unless the car was stopped or slackened in speed, yet the motorman failed to stop or slacken the speed of the car in the shortest time and space possible, still the defendant was liable if the jury also believed from the evidence that the defendant had accepted and agreed to be bound by the ordinance in evidence. The court, of its own motion, instructed the jury that nine or more of their number might render a verdict. We deem it unnecessary to set out the instructions given for defendant, or those refused which defendant requested. There was a verdict for plaintiff by eleven of the jurors for \$5,000. When the court came to consider the defendant's motion for a new trial, it announced that the motion would be sustained unless the plaintiff should remit \$1,665 of the verdict. The plaintiff entered the remittitur. The motion was then overruled, and judgment entered for the plaintiff for \$3,335, from which the defendant appeals.

1. The defendant, in its motion for a new trial, raised the question of the constitutionality of the law authorizing nine of a jury in a civil case to render a verdict, and, as the appeal was taken before this court had settled that question, the appeal was properly taken to this court. Since the decision in *Gabbert v. Railroad Co.*, 171 Mo. 84, 70 S. W. 891, that is no longer a question in this State, but, as it was a question when this appeal was taken, the court retains its jurisdiction. The only new idea in connection with that subject that is advanced in the brief of counsel in this case is that, as this action was begun and the issues joined prior to the adoption of the constitutional amendment, the cause could be tried only under the mode of procedure existing when the suit was brought or the issues were joined, and, therefore, the constitutional amendment authorizing nine of the jury to render a verdict does not apply to this case. No one has a vested right to have his cause tried by any particular mode of procedure. The State has the sovereign power to prescribe the mode of trying causes in its courts, and to alter the same from time to time as it may see fit. If the mode is prescribed by an act of the General Assembly, it may be changed by an act of the General Assembly; if it is prescribed by the Constitution, it may be changed by the power which makes the Constitution. The learned counsel for appellant have advanced no argument in support of the proposition, and for that reason we are satisfied there is no argument to support it.

2. As the plaintiff approached Wash street he looked toward

the east, and saw this car coming. It was then, according to his estimate, 250 feet distant. The house on the southeast corner was twenty-one feet from the south curb, which gave the plaintiff an unobstructed view of the approaching car. From a point forty-five feet south of the south track to that track there was a down grade of 3 per cent.; then the road was level across the two tracks. When asked why he did not stop when he saw the car coming, he said that he had no brake on his wagon, and for that reason could not stop. A grade of 3 per cent. is not a precipitous declivity, and the course of the plaintiff shows that the grade had no influence on his movement. He said that he was going in a slow walk, not over three miles an hour. If he was able to travel at that slow gait, without a brake, down the grade, he could have stopped his horses when he came to the level, or at least he could have directed their course to the right or the left. He said that when he came to the crossing he could have stopped, but he made no effort to do so; he thought he could get across, and he drove on. He was guilty of negligence that at least contributed to the accident.

But the theory of the plaintiff's case, as shown in his petition, his evidence and the argument in his brief, is that, admitting that the plaintiff, through his own negligence, put himself in a position of peril, yet the case falls within the exception to the rule that one cannot recover for injuries received in consequence of his own contributory negligence. The exception to the rule is that when the defendant sees (or, in some cases, when, by the exercise of ordinary care, he might see) the plaintiff in a position of peril, and with the means then at hand is able, by the exercise of ordinary care, to avert the injury, but neglects to do so, he is liable. Under those circumstances the defendant is adjudged guilty of such reckless or wanton disregard of human life or limb that he is not exonerated by showing that the plaintiff was also negligent. Is there anything in the evidence in this case to show such a reckless or wanton disregard of duty on the part of the defendant's servants in charge of this car? Is there any evidence tending to show that, after the motorman or motormen saw the plaintiff in peril, they could have stopped the car in time to avert the catastrophe? There is no question about

the motormen seeing the plaintiff. They both testified that they saw him when the car was 100 feet east of Twentieth street, and that he was driving, as he himself said, slowly toward the tracks. He was in plain view to the motormen, and the car was in plain view to him. The motormen said they rang the gong violently, but that is immaterial. The plaintiff did not need the gong to call his attention to the approaching car, for he saw it, and noticed that it was coming very rapidly, yet he drove slowly on. He says that he did not stop because he had no brake on his wagon. If that is true, it implies that, if he had had a brake, he would have stopped. This he said apparently in excuse for doing an imprudent act. The situation was such as would have suggested to any man of ordinary prudence to stop until the rapidly moving car had passed; just as the plaintiff's witness Hackett did. Mr. Long, a witness for plaintiff, who was a passenger on the car, and was a close observer of the situation said that as soon as he saw the horses enter on the track "we all expected" the collision. It was obvious to all that the collision would occur if the man did not stop. Under those circumstances the motormen had a right to presume that the plaintiff would stop. If there was any truth in the statement that the plaintiff could not stop because there was no brake on the wagon, that fact was not known to the motormen. There was nothing to indicate to them that the plaintiff did not have control of his wagon, and they had a right to act on the presumption that he would do what common prudence dictated for his own safety. But the plaintiff's argument is that, after the horses got on the north track, and plaintiff's peril was then obvious, the motormen could have stopped the car if they had used the effort that the ordinance required. Appellant meets this argument by saying that, if the car was going as fast as the plaintiff says it was (at thirty miles an hour when he first saw it, and increased to sixty miles an hour), it was impossible, according to all the evidence, to have stopped it in time to have prevented the collision. That is so. But the car was not going sixty, or even thirty, miles an hour; it was going between nine and ten miles an hour. All the witnesses except the plaintiff himself — those for defendant as well as for plaintiff — say the rate was nine or ten miles an hour.

Plaintiff's witnesses do not agree as to the distance the car was from the point of collision when the horses entered the north track. Mr. Long said it was from fifty to seventy-five feet, and he said that when the horses got on the track the car was then going so fast that the collision was inevitable. The car was full of passengers. The law makes their safety the motorman's first care. One of plaintiff's witnesses, who was on the car, says that before it reached Twentieth street the shock caused by the application of the brakes or the reverse of the motor was felt, and that the wheels slid on the rails. This is plaintiff's testimony, and from it, or in the face of it, the jury were authorized under the instructions to find that the defendant was liable notwithstanding the plaintiff's own negligence. That was error. The plaintiff's witnesses on this point put him in this situation: If he selects the shortest distance given by any of them, his expert testimony shows that the car could not have been stopped in time within that space; if he takes the average or medium estimate, the most favorable claim he can make is that the possibility of stopping in time was doubtful (which falls far short of showing a case of reckless or wanton misconduct on the part of the motorman); and, finally, if he takes the longest distance, it leaves the motormen room to judge that the wagon would clear the track before the car could reach it. Hackett says the distance was 108 feet, and the learned counsel for respondent thinks that is the most reliable estimate. The length of the plaintiff's outfit, horses and wagon, is not given, but it would perhaps not be assuming too much if we should say it was not more than twenty-five feet. So that, after the horses' front feet were on the north track, they had not more than twenty-five feet to travel to clear the track, and while they were going that distance the car, according to Hackett, had to go 108 feet. The evidence was the horses were going three miles an hour and the car between nine and ten. Thus, while the car was going three times as fast as the horses, it had more than three times the distance to travel. The plaintiff, seeing the car and the speed with which it was coming, judged for himself that he could clear the track before the car reached him. If that was a reasonable judgment for the plaintiff, how can he condemn the motorman if he, viewing the same situation, should reach the

same conclusion. The plaintiff was guilty of negligence which contributed to his injury, and there is nothing in the evidence tending to show that the motorman could have stopped the car in time to have prevented the collision, after the plaintiff had put himself in the position of peril. The defendant's instruction in the nature of a demurrer to the evidence should have been given. The judgment is reversed. All concur.

Holden v. Missouri Railway Co.

(Missouri — Supreme Court, Division No. 2.)

1. **COLLISION WITH VEHICLE; NEGLIGENT RATE OF SPEED IN APPROACHING TRACK; LIABILITY FOR NEGLIGENCE OF DRIVER.**¹—The plaintiff was injured in a collision between one of the defendant's cars and a wagon in which he was riding. An instruction to the effect that the plaintiff riding with the driver of a wagon had no right to rely implicitly upon the care and prudence of the driver upon the seat beside him for his own safety, but that it was his duty, if the driver was approaching the track where the collision occurred at a careless rate of speed, to attempt to have the driver check his speed to a safe rate, and that if the plaintiff made no such attempt his action contributed directly to the collision and he cannot recover, was sustained as correct.
2. **DUTY TO STOP CAR TO AVOID COLLISION WITH VEHICLE DRIVEN UPON THE TRACK AT A NEGLIGENT RATE OF SPEED.**—If a motorman discovers that a vehicle is approaching the track at a negligent rate of speed and further observes that the driver is negligent in not looking for the approach of the car, it is the duty of the motorman to so regulate the speed of his car, if in his power, to avoid the infliction of any injury, notwithstanding the negligence of the driver. The mere negligence of the driver of a vehicle in approaching and crossing a street railway track does not justify the infliction of an injury, if by the exercise

1. As to negligence of driver imputed to person riding with him, see monographic note to *United Rys., etc., Co. v. Biedler*, p. 391, *ante*. As to contributory negligence in driving on track in front of approaching car see note to preceding case. As to duty of motorman to avoid collision with vehicle driven upon or near track, see note to *Harrington v. Los Angeles Ry. Co.*, *ante*, p. 23. As to effect of ordinance regulating speed, see note to *Moore v. Lindell Ry. Co.*, 1 St. Ry. Rep. 493. As to negligent rate of speed, see note to *Warner v. St. Louis & M. R. R. Co.*, *ante*, p. 520.

of reasonable care and caution it could be avoided. An instruction, therefore, to the effect that a motorman may assume that the driver of a vehicle would have regard for his own safety and not attempt to pass in front of the car if it was obviously dangerous to do so, and that the motorman had the right to proceed at a lawful rate of speed, and was not bound to attempt to stop his car until such vehicle was about to be placed in a position of peril by coming upon the track or so close to it as to endanger the safety of the vehicle and of those therein, is erroneous.

3. **EFFECT OF SPEED ORDINANCE.**—A municipal ordinance determining the rate of speed at which street cars shall be run is not controlling upon the question of negligence of a street railway company. Even a less rate than that prescribed by the ordinance may be negligent in view of the particular conditions and circumstances under which a collision occurs.

APPEAL by defendant from an order granting plaintiff's motion for a new trial. Decided November 17, 1903. Reported 177 Mo. 456, 76 S. W. 973.

Boyle, Priest & Lehmann and *Lon O. Hocker*, for appellant.

Richard A. Jones, for respondent.

Opinion by Fox, J.

In this action the plaintiff sues to recover damages on account of injuries alleged to have been sustained on the 4th day of December, 1897, through a collision between defendant's car and a wagon in which he was riding. The action was originally instituted against both the Missouri Railroad Company and the Forest Park, Laclede & Fourth Street Railway Company, but before trial a dismissal was entered as to the Forest Park, Laclede & Fourth Street Railway Company, and the action continued against the Missouri Railroad Company alone. The Missouri Railroad Company, at the time in question, operated the railway and cars of the Forest Park, Laclede & Fourth Street Railway Company on Thirteenth street, at its intersection with Pine street, in the city of St. Louis, Mo. Thirteenth street extends north and south, and Pine street east and west. There was only one track in Thirteenth street, which was used by north-bound cars. The plaintiff was an employee of the Wainwright Brewery. At the

time of the accident, plaintiff and a man named Harry Jones, also an employee of the Wainwright Brewery, were driving a wagon, belonging to said brewery, east on Pine street.

The petition of plaintiff declares:

"That on or about the 4th day of December, 1897, plaintiff was being driven east on Pine street, in said city, and, while the wagon in which he was riding was crossing Thirteenth street and the tracks of defendant, a car of the defendants, operated by their servants, came north on Thirteenth street and struck the wagon in which plaintiff was riding, and threw the plaintiff out upon the street, and severely and seriously injured him. That Pine street, at the point where it crosses said Thirteenth street, is, and was at the time of the happening of the events hereinbefore and hereinafter narrated, a public thoroughfare of said city of St. Louis, on which large numbers of vehicles and persons are almost constantly passing and crossing said Thirteenth street and the tracks of defendants, and it was the duty of the defendants and their servants in crossing the said street to use care to run their cars at such a rate of speed as would permit the person in charge thereof to have them constantly under control, so that he could very quickly stop them to avoid injury to vehicles and persons at said crossing, and to keep a lookout for vehicles and persons that might be approaching the track upon which said cars are running, and to ring the bell of said cars and warn drivers of such vehicles and other persons of the approach of said cars to said crossings. That the defendants constructed and maintained said track and run their cars thereon under and by virtue of authority granted and restrictions and limitations prescribed by the city of St. Louis, among such restrictions being the provisions of Ordinance No. 17,072 of said city, approved March 4, 1893, entitled 'An ordinance authorizing Forest Park, Laclede & Fourth Street Railway Company to construct a railroad over, along and across certain streets in the city of St. Louis and in Forest Park, and to operate the same by electric power,' by the terms of which ordinance defendants are expressly restricted from running their cars along said Thirteenth street, or on any other part of said line, at a rate of speed in excess of ten miles an hour. That defendants, in the running of their cars on said Thirteenth street, are also governed by and amenable to division 4 of section 1275 of article 6 of Revised Ordinances of the city of St. Louis (1892), being in words following, to wit: 'Fourth. The conductor, motorman, gripman, driver, or any other person in charge of each car, shall keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving towards it, and on the first appearance of danger to such persons or vehicles the car shall be stopped in the shortest time and space possible.'"

Plaintiff, by leave of court, amended petition to show acceptance by defendant of terms of ordinance of city of St. Louis, subdivision 4, section 1275, Revised Ordinances, 1892, requiring person in

charge of car to keep a vigilant watch for all vehicles and persons on foot, either on the track or moving toward it, and to stop, at the first appearance of danger to such persons or vehicles, in the shortest time and space possible. The petition alleges a breach of the duties aforesaid, and the consequent injury to plaintiff. Defendant's answer is, first, a general denial, and, second, a plea of negligence on the part of the plaintiff and of one Harry Jones, who was driving the wagon in which plaintiff was riding.

The evidence on the part of the plaintiff tended to show that the crossing at Pine and Thirteenth streets, where the injury occurred, was a busy one; that plaintiff and Harry Jones were driving east on Pine street in a one-horse stake wagon; that the horse was going down grade at a trot, about five to seven miles an hour; that when the horse was within four or five feet of the track they looked south and saw a car coming rapidly, about twenty-five feet away; the driver turned the horse diagonally across the street toward the north, and after reaching the north crossing of Pine street, while one wheel of the wagon was on the car track, the car, which had not yet stopped, hit the rear of the wagon with such force as to precipitate both plaintiff and the driver onto the granite pavement of the street, the plaintiff striking on his head, cutting a gash about six inches long. The evidence of the plaintiff also tended to show that the car was approaching at the rate of about fifteen miles an hour, and that the gong was not sounded.

The evidence of the defendant tended to show that the plaintiff and Harry Jones were driving the wagon east on Pine street at a rapid rate of speed; that the bell was sounded violently; that the car was going from four to seven miles an hour; that the car was stopped within twenty-five feet after the first application of the brakes, and that just as the car stopped the wagon struck the front step of the car and splintered it, throwing the two men from the seat of the wagon. Evidence was also introduced tending to show that a party standing thirty-eight feet west of the west rail of the car track could see a distance in Thirteenth street of seventy-two feet.

No direct evidence was introduced by plaintiff tending to show that the motorman failed to stop the car within the shortest time and space possible, or within what distance the car, such as the

one involved, under the conditions and surroundings existing at the time, could be stopped.

Under the instructions of the court the jury found a verdict for the defendant. Within four days after the rendering of said verdict, the plaintiff filed his motion for a new trial, setting up twelve grounds, which said motion the court sustained upon the ground that the court gave to the jury erroneous instructions, and from which order granting a new trial the defendant has appealed to this court.

The instructions given on the part of the defendant are as follows:

"(1) The court instructs the jury that although the plaintiff may not have been the driver of the wagon mentioned in the testimony, nevertheless plaintiff, situated as he was, had no right to rely implicitly upon the care and prudence of the driver on the seat beside him for his own safety, but it was his duty, if said driver was approaching said Thirteenth street, on which cars were passing, at a careless rate of speed, to attempt to have him check his speed to a safe rate, and if the jury find that under the circumstances said wagon was approaching defendant's tracks at a careless rate of speed, and that plaintiff, situated as he was, made no effort to have said speed diminished, and that such action of the plaintiff contributed directly to said collision and his injuries, then he cannot recover, and your verdict must be for defendant.

"(2) If the jury believe from the facts and circumstances given in evidence that the plaintiff, situated as he was in the wagon, would in the exercise of ordinary care have seen the approaching car on Thirteenth street in time to have warned the driver of its approach, and in time to have prevented the collision, then it was his duty to have done so, and if he failed to do so then he cannot recover, and your verdict must be for defendant, notwithstanding the defendant may also have been negligent.

"(3) The court instructs the jury that it is the duty of persons on public streets, whether on foot or in vehicles, to be ordinarily prudent and careful in crossing street-car tracks, and to both look and listen for approaching cars, and, even though the jury should find in this case that the gong of the car was not sounded, still if the plaintiff could, by exercising ordinary care with respect to the speed with which he approached the track, and in looking for the approach of cars, have caused said wagon to be stopped in time to avert the collision, then your verdict will be for the defendant.

"(4) Even though the servants of the defendant in charge of its car saw the plaintiff and his vehicle moving toward the track along which their car was moving, still they had the right to assume that the person or persons in charge of said vehicle would have regard for their own safety, and not attempt to pass in front of the said car if it was obviously dangerous

to do so; and the said servants had the right to assume that said vehicle would be stopped when it came to the track, and not be driven across in front of the car if such a course was manifestly unsafe, and the said servants had the right to proceed at a lawful rate of speed, and were not bound to attempt to stop their car until the said vehicle was about to be placed in a position of peril by going upon the track or so close to it as to endanger its safety and of those therein.

"(5) The court instructs the jury that unless they believe from the greater weight of the evidence that the defendant, through its servants in charge of its car at the time and place of the accident, negligently ran its car at a speed greater than ten miles per hour, or failed to keep a vigilant watch for persons and vehicles about to be in danger of being struck thereby, or negligently failed to ring the gong, and that one or more of such acts of negligence were the cause of the accident and the plaintiff's injuries, then their verdict will be for the defendant. And even though the jury should find that the defendant, through its servants, was guilty of one or more of the acts of negligence hereinbefore stated, if they further find that the plaintiff was himself guilty of negligence which directly contributed to the bringing about of the accident, then their verdict must be for the defendant.

"By the term 'ordinary care,' as used in these instructions, is meant that degree of care which would be used by a person of ordinary prudence under the same or similar circumstances."

It will be observed that the court sustained the motion for a new trial in this cause upon the ground of erroneous instructions given to the jury. From the action of the court upon such motion, this cause is now presented to this court for review. We have given due attention to the testimony in this cause, as disclosed in the record, and have reached the conclusion that the court was warranted in submitting it to the jury. Hence the only question left for investigation is the correctness or incorrectness of the declarations of law. Appellant insists that the declarations of law were appropriate to the facts developed in this cause, and were in all respects in proper form.

The issues tendered by the petition, in this suit, may be briefly stated: First, that the injury occurred at a crossing of a public thoroughfare in the city of St. Louis—Thirteenth and Pine streets. That at said point vehicles and persons are almost constantly passing and crossing; that it was the duty of appellant, in the management and operation of its railway, to run its cars at that point at such rate of speed and with such care as to avoid injury to vehicles and persons; and that the injury complained of

resulted from such neglect of duty in operating its cars at a negligent rate of speed. Second. That the car was run in excess of ten miles an hour, in violation of Ordinance No. 17,072, and also in violation of the provisions of section 1275 of article 6, Revised Ordinances of the City of St. Louis, which last-mentioned ordinance provided: "Fourth. The conductor, motorman, gripman, driver, or any other person in charge of each car, shall keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving toward it, and on the first appearance of danger to such persons or vehicles, the car shall be stopped in the shortest time and space possible." It is made apparent, from an examination of the petition, that the recovery sought in this cause is not confined to a violation of the ordinances of the city, but includes a sufficient charge of negligence in the operation of the cars at a careless and negligent rate of speed, under the conditions and circumstances, at the point where the injury was inflicted.

Treating of the instructions in the order as numbered, we find instruction No. 1 substantially correct; the error consists in the failure to give due attention to punctuation. (This is frankly conceded by learned counsel for appellant.) This omission may have tended to mislead the jury in the application of the facts to this declaration. Properly understood, as doubtless the trial court intended it to be interpreted and correctly punctuated, the "careless rate of speed" designated in the instruction refers to the driver of the wagon in approaching the crossing; but a disregard in this respect might have a tendency to mislead the jury and incline them to apply the terms "careless rate of speed" to the cars. This is the only criticism to which this instruction is subject. To enable the jury intelligently to apply the facts to the law as declared by the court, such declarations should be clear and unambiguous. Upon the retrial of this cause, it is suggested that such terms be employed in the instruction as will remove all doubt as to whom the terms "careless rate of speed" are applicable.

Instruction No. 4 finds support in *Boyd v. Railway Co.*, 105 Mo. 371, 16 S. W. 909. Upon the facts in that case, this court approved of the following declaration: "That it was the duty of deceased to look and listen, if he could see or hear the train,

for the purpose of avoiding injury by it, and, if at any time he might have stopped his progress and avoided injury, then he was guilty of contributory negligence;" and "if the servants of defendant in charge of its train saw the deceased approaching the track, then they had the right to presume that he would not attempt to cross the track immediately in front of the train, and to proceed without abating the speed of the train." It may be conceded, predicated upon a state of facts which would warrant such an instruction, that the rule announced is the correct one. It is fundamental that all declarations must be based upon the particular facts developed in the cause. The correctness of instruction No. 4 must be determined from the testimony upon which it purports to be based. The motorman, William A. Colson, at the time of this injury, testified partly as follows: "They were coming down at a very rapid rate of speed, and as we crossed, coming across Thirteenth street, I heard the rumbling, which attracted my attention as I approached, and I saw the teams coming down the street, rang my bell very violently, and the parties didn't seem to pay any attention or notice me." It will be observed that this instruction, in guiding the jury to a verdict, told them, in respect as to what the servants of the defendant had the right to assume: "And the said servants had the right to assume that said vehicle would be stopped when it came to the track and not be driven across in front of the car if such a course was manifestly unsafe, and the said servants had the right to proceed at a lawful rate of speed, and were not bound to attempt to stop their car until the said vehicle was about to be placed in a position of peril by going upon the track or so close to it as to endanger its safety and of those therein." This assumption of the servants that the vehicle of persons in approaching a crossing will stop before a perilous position is reached is based upon the right of the servants to presume that the persons and vehicle will approach the crossing with care and caution, and they have done their duty in the way of looking out for an approaching car; but if, on the other hand, as the motorman says, they were negligent, and that he saw them, and they were not heeding his signals and seemed to pay no attention to the car, does the rule announced in the instruction, that the servant had the right to assume that they would stop, apply? The

servant cannot assume a certain course of conduct and at the same time say that he knew that course of conduct was not being pursued. We take it that if the motorman discovered that the vehicle was approaching this crossing at a negligent rate of speed, and that he further observed that they were negligent in not looking out for the approach of the car, then, notwithstanding the negligence of the plaintiff, it was the duty of the motorman to so regulate the speed of this car, if in his power, to avoid the infliction of any injury. In other words, the mere negligence of the plaintiff in approaching and crossing the track would not justify the infliction of an injury, if by the exercise of reasonable care and caution it could be avoided. The servant will not be permitted to assume that a person is aware of the approach of the car and will stop in due time to avoid injury, and at the same time admit that he knows that the person was not performing his duty in that respect, in ignoring the violent ringing of the bell, giving no attention or notice to the approach of the car. It will be noted that this instruction tells the jury, in effect, that, notwithstanding the motorman says he violently rang the bell and that plaintiff and the driver gave it no attention or notice, it was proper to continue the movement of the car at a lawful rate of speed. The motorman further testifies that, upon observing the conduct of the plaintiff and driver in their efforts to make the crossing, he stopped the speed of the car as soon as possible. If the motorman did that, the defendant was not liable for the injury; but the instruction under discussion does not proceed upon that theory. It practically states the law to be that, notwithstanding the surroundings at the time, he had the right to proceed at a lawful rate of speed. What was the lawful rate of speed as contemplated by the instruction? Was it ten miles an hour, as fixed by the ordinance? There is no law to which our attention has been directed fixing a legal rate of speed. The ordinance simply undertakes to limit and regulate the speed, but it by no means, by such limitation, determines a legal rate of speed at a busy public crossing in the very heart of a populous city. The rate of speed at a public crossing where vehicles and persons are constantly passing, is fixed alone by the conditions and circumstances surrounding the street at the time the car is making the crossing. In our opinion, the term

"lawful rate of speed" has no place in that instruction. They are misleading, and too apt to be construed by the jury as being the rate as fixed by the ordinance. If warranted under the facts in assuming that plaintiff and driver would stop before reaching a perilous position, yet such care and watchfulness should be exercised in the movement of the car at that point as the conditions and circumstances would dictate to a reasonably careful and prudent man.

In *Bunyan v. Railway Co.*, 127 Mo. (loc. cit.) 12, 29 S. W. 842, the views as herein expressed upon this instruction are fully supported. This court said in that case:

"The testimony of the gripman shows that he discovered that deceased was staggering, and did not know what he was doing, when at least five or six feet from the track. It was his duty under these circumstances to have at once taken precautions to prevent the collision. He should not have deferred action until the deceased had placed himself in a dangerous position, when it was manifest to him that he was heedlessly staggering into it. This principle, dictated as it is by common humanity, was recognized by the gripman, for he says that on seeing that deceased was paying no attention, and did not seem to know what he was doing, he immediately warned him of the danger, and used all possible efforts to avoid injuring him. Now, it will be seen that the instruction, which only required the gripman to attempt to avoid injuring deceased 'after he had put himself in danger,' fell short of declaring the whole duty required of him in the circumstances. The primary object of this instruction was evidently to inform the jury as to the care required by deceased himself. So far as the instruction was confined to this purpose the law was correctly given, but it did not declare the duty of the gripman as hereinbefore announced. The jury could have drawn no other conclusion from the instructions than that the gripman, though seeing that deceased was staggering, was paying no attention, and was not going to stop, was still under no obligation to attempt to avoid striking him until 'after he had put himself in danger.' * * * The first instruction was clearly misleading, and in conflict with other instructions given. It undertook to dispose of the whole case, and in effect directed a verdict for defendant, if deceased was himself negligent, unless the gripman failed in his duties after deceased had put himself in a position of danger. It wholly ignored the evidence of the gripman, and his duty to prevent the injury as soon as he saw that deceased was carelessly walking onto the track. The petition charged negligence in failing to stop the car in time to prevent the accident. This averment was sufficient to authorize the admission of evidence that the gripman knew that deceased was not going to stop, especially when no objection was made to it when offered. Indeed, this evidence was introduced by defendant itself. We are of the opinion that error was committed in giving this instruction."

Instruction No. 4, upon the facts as disclosed by the record in this cause, was erroneous.

This leads us to the only remaining question, in respect to the correctness of instruction No. 5. This instruction clearly confines the right of recovery, so far as rate of speed is concerned, to a rate of speed in excess of ten miles an hour. This, in our opinion, is a misconception of the law in the operation of railways across busy public streets in a large, populous city. As before stated, in the discussion of instruction No. 4, this ordinance limiting and regulating the speed of cars on street railways cannot be construed as authorizing the operation of cars at a public crossing at any particular rate of speed, regardless of conditions at the time of the crossing. The rate of speed at such points must be regulated alone by the conditions and circumstances that confront the operator or motorman at the time. Operating a car at a rate of speed in excess of ten miles an hour, from which an injury resulted, would be negligence, because in violation of the ordinance under which the railway assumed to operate its cars. Operating a car across a public street at the rate of five miles per hour, from which an injury resulted, if the conditions and circumstances were such as to prompt a reasonable and careful operator to lessen the speed and thereby avoid the injury, would be equally negligent, and the city of St. Louis cannot, by ordinance, absolve the railway company from liability, for want of care and caution in operating its cars across the public streets, by limiting and regulating their speed. This rule is clearly announced in numerous cases by this court:

In *Vannatta v. Railway Co.*, 133 Mo. 13, 34 S. W. 505, Burgess, J., speaking for the court said:

"What constitutes negligence in any given case must necessarily depend upon the facts connected with the accident which is claimed to have been occasioned thereby, and the place where it occurred. What would be a negligent rate of speed for an electric street car in one locality would not necessarily be so in another part of the same city or the same street. Plaintiff's right to the use of the street where the accident occurred was concurrent with that of defendant company. It happened under the circumstances where and when the law required of those in charge of the car the exercise of such care and watchfulness, including its rate of speed, as the circumstances of the case and the place where the accident occurred de-

manded. Under the facts and circumstances in evidence the court would not have been justified in declaring, as a matter of law, that the car was not moving at a rapid rate of speed at the time of the accident. There was sufficient evidence on this question to justify giving the instruction."

In *Hicks v. Railway Co.*, 64 Mo. (loc. cit.) 439, in discussing this subject, this court very forcibly announced the duties of a railway company to the public:

"The care and caution required by railroad companies in running their trains are commensurate with the danger to persons and property incident to that mode of transporting freight and passengers, and at some points on the road greater care is exacted than at others. In running through towns and cities, and over public crossings, they are expected to be more careful than at other places where not so likely to injure persons or property. In approaching stopping places where people are in the habit, for business or pleasure, of congregating, they must exercise the care and prudence which a proper regard for human life dictates; and to hold that a railroad company is only liable for wanton injury in such a case as we are considering would encourage recklessness in the running and managing of trains, which would be intolerable. These companies not only owe a duty to passengers and others lawfully on their tracks and platforms, but a duty to the public to exercise the rights conferred upon them, with a due regard to the safety of all persons and property."

We find, also, in *Burger v. Railway Co.*, 112 Mo. (loc. cit.) 246, 20 S. W. 439, 34 Am. St. Rep. 379, a very clear expression and approval of the well-settled rule in respect to the duties of railroad companies to the public. MacFarlane, J., in announcing the opinion of the court, said:

"We do not think it follows, from the fact that the statute only enjoins these crossing signals, that no others are required under any circumstances. Our courts have declared, over and over again, that the greatest diligence, watchfulness, and care should be observed by those running and operating trains in towns and cities, especially on and over streets and other public places therein. These duties they owe to every one who has the right to use such public places in common with them."

To the same effect is the case of *Frick v. Railway Co.*, 75 Mo. (loc. cit.) 609. The court said in that case:

"A less degree of vigilance will ordinarily be required between the streets of a town or city than will be required at the street crossing, or when running longitudinally in a street; but, undoubtedly, some vigilance is re-

quired even between the streets, and the degree required will necessarily vary with the attendant circumstances. In any case the requisite degree of vigilance may be properly designated by the words 'ordinary care,' that is, such care as would be ordinarily used by prudent persons performing a like service under similar circumstances."

Thus we find the charge of negligence as to rate of speed in operating cars, from which an injury results, is always one to be determined from the attendant conditions and circumstances. This unbroken line of expression as to the subject being discussed is emphasized in the dissenting opinion of Sherwood, J., in *Lamb v. Railway Co.*, 147 Mo. (loc. cit.) 204, 48 S. W. 659, 51 S. W. 81. While their views are expressed in a dissenting opinion, it is apparent from the majority opinion that in the expression herein quoted there was no disagreement. The clear announcement of the doctrine by that able and distinguished judge is pertinent to the question involved in instruction No. 5 given in this cause, and fully supports the views as herein expressed. He said:

"Outside of the statute, and under the principles of the common law, a railroad corporation would not perform its full duty of ordinary care unless those employed on a switching engine, engaged in its customary avocation, should ring its bell, or, if necessary, take any other precaution adapted to the exigency of the situation. It is this exigency which, like the mercury in the thermometer, determines to what degree prudence shall rise in order to reach the mark of ordinary care."

The petition in this cause is broad enough to include the charge of a negligent rate of speed at the public crossing of Thirteenth and Pine streets, and that question should not have been ignored in the declarations of law. We have reached the conclusion that instruction No. 5, as given by the trial court at the request of the defendant, was erroneous in limiting plaintiff's right of recovery to the violation of the city ordinance.

The action of the trial court in sustaining motion for new trial is affirmed. All concur, except BURGESS, J., absent.

Ilges v. St. Louis Transit Co.

(Missouri — Court of Appeals, St. Louis.)

1. **INJURY TO PASSENGER BY BEING THROWN FROM OPEN CAR BY A SUDDEN LURCH THEREOF.**¹—The plaintiff, a passenger on one of the defendant's street cars, which was a four-wheel summer car, the trucks being in the center, was thrown therefrom into the street by a sudden jerk or lurch. At the time she was thrown she was standing in the body of the car. It was held that the jerk or lurch being sufficient to throw the plaintiff from the place where she stood into the street justified a finding that the car was negligently operated.
2. **DEGREE OF CARE FOR SAFETY OF PASSENGERS.**—An instruction that a street-car company is bound to use the highest degree of care for the safety of its passengers, together with an instruction to the effect that if the motorman was negligent and his negligence caused the car to lurch, etc., plaintiff could recover is not erroneous, although a definition of the term "highest degree of care" was not included therein.

APPEAL by defendant from judgment for plaintiff. Decided November 17, 1903. Reported 102 Mo. App. 529, 77 S. W. 93.

Boyle, Priest & Lehman, for appellant.

E. E. Wood, for respondent.

Opinion by BLAND, P. J.

On the 15th day of August, 1902, the plaintiff was a passenger on one of defendant's street cars running south on Grand avenue, in the city of St. Louis. She was either thrown from the car into the street by a sudden jerk or lurch of the car forward, or stepped

1. **Passengers injured by sudden jerk or jolt.**—In the management of an electric car a sudden and violent stopping or starting of such car, unless it is unusual in degree, and caused by some defect in the car or in the track, or by some unusual or dangerous rate of speed, furnishes no evidence of negligence on the part of the company. *Nellis Street Railroad Accident Law*, p. 100, citing *Chicago City Ry. Co. v. Morse*, 98 Ill. App. 662, affirmed, 197 Ill. 327, 64 N. E. 304. Thus it was held in the case of *Byrne v. Lynn & B. R. Co.*, 177 Mass. 303, 58 N. E. 1015, that a passenger on a street car, who was injured by being thrown to the ground by the lurch of the car in passing over the main track to a switch track, cannot recover therefor, where there is no evidence that the injury was due to a defect in the car or track, or that

off the car while it was in motion, and fell into the street. The fall, however occasioned, injured her. For these injuries she recovered a judgment for \$2,833 in the Circuit Court. From this judgment the defendant duly appealed.

The petition counts upon six distinct acts of negligence on the part of defendant, but the court confined the attention of the jury to but one, comprehended in the following instruction given for the plaintiff, to wit: "If the jury believe from the evidence that the motorman in charge of defendant's car was negligent, and

the speed was unusual or dangerous; such motions of street cars are of quite frequent occurrence, and are to be expected to a greater or less degree whenever the car passes from one track to another, and are, therefore, of the class of usual unavoidable incidents to the use of cars upon the street. See also note to *Timms v. Old Colony St. Ry. Co.*, 1 St. Ry. Rep. 301. To recover from a street railroad company for injuries received by a sudden lurch or jerk of the car it must affirmatively appear that such lurch or jerk was an extraordinary or unusual one, or attributable to a defect in the track, an imperfection in the car or apparatus, a dangerous rate of speed, or the unskilled handling of the car by its operator. *Bartley v. Metropolitan St. Ry. Co.*, 148 Mo. 124, 49 S. W. 840.

In the case of *Scott v. Bergen County Tract. Co.*, 64 N. J. L. 362, 48 Atl. 1118, it was held that the occurrence of a sudden lurch or jerk of a street car, of sufficient violence to throw a passenger off the platform, who was there preparing to alight, and awaiting the stopping of the car for that purpose, justifies an inference of a breach of duty upon the part of those operating the car, and the doctrine of *res ipsa loquitur* applies.

In an action against a street railway company for injuries to a passenger resulting from being thrown off a car while turning a curve, the rate at which the car was going is immaterial, if it is shown that its speed was improper. *Gidionsen v. Union Depot Ry. Co.*, 129 Mo. 392, 31 S. W. 800.

It may constitute negligence that a train or car is so operated as that, by jerking or jarring, passengers are imperiled, who are properly conducting themselves with reference to their transportation, even though they may be standing or moving for the purpose of getting off the conveyance. In this respect the conveyance must be operated with regard to the situation of the passengers, as known to, or as it should be known to, the servants in charge. But such jerks and jars as are necessarily incident to the use of the conveyance, and not the result of negligence, will not render the carrier liable for resulting injuries. 6 Cyc. 624. See also *Goodkind v. Metropolitan St. Ry. Co.*, 2 St. Ry. Rep. 797, 93 App. Div. (N. Y.) 153, 83 N. Y. Supp. 523; *Gatens v. Metropolitan St. Ry. Co.*, 2 St. Ry. Rep. 793, 89 App. Div. (N. Y.) 311, 85 N. Y. Supp. 967; *Jennings v. Union Traction Co.*, 1 St. Ry. Rep. 743, (Pa.) 55 Atl. 765.

that his negligence caused the car to lurch, and that said lurch threw plaintiff into the street, causing injuries to her, then they should find in favor of the plaintiff and against the defendant, unless they find from the evidence that the plaintiff was not at the time exercising ordinary care for her own safety." All the other allegations of negligence were taken from the jury by instructions given for the defendant. The answer was a general denial, and an allegation that plaintiff's injuries were occasioned by her own negligence in stepping off of a moving car.

The evidence is that the car on which plaintiff was a passenger was a four-wheel summer car, the trucks being in the center, and that the car rocked when running on an uneven track. Plaintiff got on the car at Florissant avenue to go south to where Olive street crosses Grand avenue. When she boarded the car there were only a few passengers on it, but, before reaching her place of destination, the car, which was open on both sides and at each end, with running-boards on either side, became very crowded with passengers. The seats were all full, and the end platforms, and some passengers were standing in between the seats inside the car, and the running-boards were crowded with as many as could hang on. When the car reached Washington avenue, one block north of Olive street, it slowed up, and two or three young men stepped from the running-board into the street. At this juncture plaintiff testified that she arose from her seat near the west side of the car to press the button to signal the motorman to stop the car at the Olive street crossing, that she might alight; that when she arose she found the car so crowded that she could not reach the button in the stanchion at the end of the seat where she had been seated, and so she reached around and over some one to touch the button in the stanchion in front of her, and while she was in the act the car gave a sudden lurch, and threw her into the street, severely injuring her. She is corroborated by the evidence of other witnesses. On the part of the defendant, the evidence of several disinterested witnesses, who were passengers on the same car, is that plaintiff arose from her seat, pressed her way around some passengers, and stepped on the running-board while the car was running at a speed of from five to seven miles an hour, and fell into

the street; that the car did not start suddenly forward after slowing up; that it did not lurch, but was running as such cars ordinarily move.

1. The contention of the defendant that there is a failure of proof is not borne out by the evidence. Plaintiff's evidence that she was thrown from the body of the car into the street, if believed by the jury, must have established in their minds, beyond peradventure, that there was an unusual and very severe lurching or jerking of the car to cause the plaintiff's misfortune; and we think the court correctly overruled the demurrer to the evidence offered at the close of plaintiff's evidence, and again at the close of all the evidence.

2. The first instruction given for plaintiff is as follows: "The court instructs the jury that a common carrier of persons, such as a street car corporation, is bound to use the highest degree of care for the safety of its passengers." Defendant contends, not that the instruction erroneously declares the law in the abstract, but that the term "the highest degree of care" should have been defined, or the instruction modified, and cites *Dougherty v. Missouri R. Co.*, 97 Mo. 647, 8 S. W. 900, 11 S. W. 251; *Smith v. Chicago & Alton Ry. Co.*, 108 Mo. 243, 18 S. W. 971; *Jackson v. Grand Ave. Ry. Co.*, 118 Mo. 199, 24 S. W. 192; and *Freeman v. Railway Co.*, 95 Mo. App. 94, 68 S. W. 1057 — in support of its contention. *Dougherty v. Missouri R. Co.*, *supra*, was a suit by a passenger for damages caused by a sudden, violent start of the defendant's horse car. Instruction No. 3, given for the plaintiff, told the jury that, under the circumstances of the case, it was the duty of the manager or driver of the car to exercise the "utmost human foresight, knowledge, skill, and care." The instruction was approved, but on a rehearing the majority of the Supreme Court were of the opinion that the instruction stated the abstract proposition too broadly as to the degree of care incumbent on the defendant. In *Smith v. Chicago & Alton Ry. Co.*, *supra*, it is said an instruction that "the law imposes on a common carrier of passengers the utmost care in carrying them safely is not erroneous, where an instruction is also given that the carrier is not an insurer of the safety of passengers, and that negligence on the part of its servants must be shown." In *Jackson v. Railroad Co.*, 118

Mo. (loc. cit.) 225, 24 S. W. 192, the Dougherty and Smith cases are approvingly cited. In *Freeman v. Metropolitan Street Ry. Co.*, 95 Mo. App. 94, 68 S. W. 1057, an instruction which declared the defendant (a passenger carrier) "guilty of negligence, unless he exercised the utmost human skill, diligence, and foresight to prevent the accident" to the passenger was held erroneous. *Leslie v. W., St. L. & P. Ry. Co.*, 88 Mo. 50, was a suit by a passenger for damages occasioned by the negligence of the carrier. In respect to the duty of the carrier to the passenger, the court instructed the jury that the defendant was bound to use the highest degree of care. The court held that, as a general statement of the liability of the carrier, the instruction was not objectionable, and that the fact that the instruction proceeded to state hypothetically the facts upon which the plaintiff might recover sufficiently qualified the general proposition. The instruction under consideration is not qualified in any manner, nor is there any other instruction given in the case which hypothetically sets out facts upon which the plaintiff might recover. The second instruction (above quoted), in general terms, tells the jury that if the motorman was negligent, and his negligence caused the car to lurch, etc., plaintiff could recover. The two instructions, when considered together, in effect told the jury that it was the duty of the motorman to exercise the highest degree of care, and if he failed to exercise such high degree of care, and the car lurched, and plaintiff was thrown into the street, she could recover. In *Furnish v. Railroad Co.*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781, an instruction defining the skill, diligence, and foresight required of a passenger car driver was defined as "such skill, diligence, and foresight as is exercised by a very cautious person under like circumstances." In *Feary v. Railroad Co.*, 162 Mo. 75, 62 S. W. 452, an instruction telling the jury, "If defendant's servants and employees exercised all the care and foresight that was reasonably practicable, then there is no negligence," was approved. The court, through Marshall, J., said: "The instruction under consideration requires all the care and foresight that was reasonably practicable. The law requires nothing that is unreasonable." The highest degree of care signifies nothing short of the exercise of the utmost human skill and care. There can be no degree of care higher than the highest. "Car-

riers of passengers," says Story (Story Bailments [2d ed.], § 600), "binds themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go; that is, with the utmost care and diligence of very cautious persons." In *Gilson v. Railway Co.*, 76 Mo. 282, the court said: "The care required is that care, prudence, and caution which a very competent and prudent person would use and exercise in a like business and under like circumstances." In *Shearman & Redfield Negligence* (4th ed.), § 405, it is said: "The obligation of a common carrier is said to be the utmost care and skill which prudent men are accustomed to use under similar circumstances." In *Dodge v. Steamship Co.* (Mass.), 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541, the words "utmost care and skill" were held not to mean the utmost care and diligence which men are capable of exercising, but to mean the utmost care consistent with the carrier's undertaking, and with due regard for all the other matters which ought to be considered in conducting the business. In *Libby v. Railroad Co.* (Me.), 26 Atl. 943, 20 L. R. A. 812, it is said: "A common carrier of passengers, although not an insurer, must do all that human care, vigilance, and foresight can, under the circumstances, considering the character and mode of conveyance, to prevent accident to passengers." While, as an abstract proposition, common carriers of passengers are bound to use the utmost care and skill to prevent injuries to their passengers, yet the rule should be applied in a practical manner. That it may be so applied, the text-books and many of the cases have set up some standard (usually the standard of care, skill, and foresight which a very competent and prudent person would be expected to use and exercise under like or similar circumstances) by which the jury may measure the degree of care required. And it seems to us that some such standard should somewhere be incorporated in the instructions to the jury in this class of cases, so that they may not be left to set up a standard of their own, and to run it up as high as their imaginations will allow them. But if it is not done, the omission has never, so far as we are informed, been held to be reversible error. This very question has, at the present term of this court, in the case of *Fillingham v. St. Louis Transit Co.*, been so fully and exhaustively treated in an opinion by Goode, J., that nothing remains to be said.

3. The court gave the following instruction: "If the jury find in favor of the plaintiff, they should assess her such damages as they think, under the evidence, would compensate her for the pain and suffering she has endured by reason of her injuries, and such further sum as they think would fairly compensate plaintiff for the injuries sustained"—to which defendant objected, and counsel insists here that it gave the jury a boundless commission to assess damages. The word "think" has various meanings. Its meaning must be ascertained from the connection in which it is used in a sentence. Some of its meanings, according to Webster, are "to form an opinion by reasoning; to judge; to conclude; to believe." The jury, by the instruction, were required to think of the damages under the evidence, not outside of it, and to think out (judge) the damages from the evidence. We see no substantial objection to the wording of the instruction, and we think that it was as well understood by the jury as if the word "believe" or "find" had been used instead of the word "think."

Other assignments of error are discussed in the briefs, but they are found to be without merit, and the judgment is affirmed.

REYBURN and GOODE, JJ., concur.

Farrell v. St. Louis Transit Co.

(Missouri—Court of Appeals, St. Louis.)

UNLAWFUL ARREST OF PASSENGER; EXCESSIVE DAMAGES.—The plaintiff was a passenger on a car of the defendant and before arriving at his destination the car was stopped and the passengers directed to alight and wait for another car. A number of cars approached and passed the passengers without stopping. One of the passengers as another car approached picked up a rock and threw it through a car window, whereupon the motorman stopped the car and the group of passengers got on

Unlawful arrest of passenger.—In the case of *Grayson v. St. Louis Transit Co.* (Mo. App.), 71 S. W. 730, it was held that where, as a passenger was descending from a street car, the conductor pushed him off, and at the same time called on a policeman to arrest him, he had not ceased to be a passenger when the order to the policeman was given, so as to release the conductor from liability if the arrest was wrongful. A statute giving a street car com-

board. The plaintiff was accused of being the man who threw the stone, and was subsequently arrested and tried and found not guilty. In an action for malicious prosecution against the street railway company the jury returned a verdict of \$1,500 for actual damages and \$1,000 for exemplary damages. It was held that, although the plaintiff was a peaceful and law-abiding citizen, the verdict was excessive and should be set aside.

APPEAL by plaintiff from an order granting a new trial. Decided December 1, 1903. Reported (Mo. App.) 78 S. W. 312.

Parson & Clark, for appellant.

Boyle, Priest & Lehman, for respondent.

Opinion by REYBURN, J.

Plaintiff, on the evening of March 14, 1902, between 6 and 7 o'clock, was a passenger on a car of defendant on his way homeward. At a point just beyond Lee avenue, on Prairie avenue, the conductor gave an order that the car be vacated by all passengers, which they complied with, and walked forward to the first of several other cars ahead, where they were informed by the motorman that he was behind time, and would not go on, and the several cars then backed down to the car sheds. With

ductor all the powers of a police officer while in charge of the car, does not relieve the carrier from liability for false imprisonment of a passenger made or caused to be made by him. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243, 14 I. R. A. 798.

In order to impose a liability upon a street car company the unlawful arrest must have been brought about by the conductor or other employee acting clearly within the scope of his employment. Thus a street car company would not be liable for the arrest of a passenger by a policeman called by a conductor upon the charge of riding without payment of fare, when the only authority the conductor had was to eject a passenger who failed to pay his fare. *Little Rock Traction & E. Co. v. Walker*, 64 Ark. 144, 45 S. W. 57, 40 L. R. A. 473. This is in recognition of the general rule that common carriers are responsible to passengers for torts committed by employees acting within the scope of their employment and in connection with the business intrusted to such employees. *Gasway v. Atlanta, etc., R. Co.*, 58 Ga. 216.

In the case of *Lynch v. Metropolitan Elev. Ry. Co.*, 90 N. Y. 77, 43 Am. Rep. 141, the plaintiff purchased a ticket for a passage upon the defendant's

about fifteen other passengers emptied out of these cars, plaintiff proceeded to await the arrival of another car, being still about three-quarters of a mile from his destination. The first car to arrive, in response to a signal, slackened speed, but without stopping, and some one of the waiting passengers threw a handful of pebbles against the window; and as another car arrived five minutes later, some man in the crowd, a stranger to plaintiff, saying, "This car will stop," picked up a rock, and as the car was about to pass as the preceding one had, threw it through a car window, whereupon the motorman stopped the car, and the group of passengers got on board, and as plaintiff was about to enter the motorman and conductor accused him of being the man who threw the stone. He denied the charge, and pointed out a man going down the street as the responsible party. Ultimately they permitted him to get on the car, stating they would have him arrested at Newstead avenue, where they sent for a policeman, and put him under arrest, and the officer, accompanied by one or more of defendant's employees, took him to the Grand avenue police station, where he was searched, a charge of disturbing the peace lodged against him, and after detention there less than an hour he gave bond and was released. On the 20th of March, 1902, plaintiff was arraigned, tried, and found

elevated railway and entered one of its cars; before reaching his destination he lost his ticket, and when he attempted to pass through the gate from the station platform he was stopped by the gatekeeper and told that he could not pass until he produced a ticket or paid his fare; he stated the facts of his purchase of a ticket and its loss, and insisted in passing out, but he was pushed back by the gatekeeper, who sent for a police officer and ordered his arrest; he was arrested, taken to the police station, where the gatekeeper made a complaint against him, and he was locked up over night. In the morning the plaintiff was examined before a police magistrate and discharged; the railway company had given orders to its gatekeepers not to let passengers pass out until they either paid their fares or showed tickets; it was held in an action for false imprisonment that the detention was unlawful, that the defendant was responsible for the acts of the gatekeeper, and that the plaintiff was entitled to recover. See also *Rown v. Christopher & Tenth St. R. Co.*, 34 Hun (N. Y.), 471, where it was held that the act of a street car driver in delivering a passenger over to a policeman on the ground that he had not paid his fare is an act for which the company can be held liable by the passenger if in fact he had paid his fare.

not guilty, in the Second District Police Court of the city of St. Louis, of the charge of disturbing the peace.

Stripped of matters in aggravation, consisting of grossly abusive conduct toward him on part of defendant's servants while plaintiff was detained by them pending the arrival of the officer, and somewhat abridged, the foregoing narrative presents a fair statement of the transaction from which this action for damages for malicious prosecution emanated, and the plaintiff's narrative of which was fully established in all important details by the corroborative testimony of disinterested witnesses. Defendant offered no testimony, and a jury returned a verdict in favor of plaintiff for actual damages in the sum of \$1,500 and exemplary damages in the amount of \$1,000. Defendant's motion for new trial was sustained, the court assigning as reasons the admission of irrelevant and immaterial testimony, the giving of improper instructions, and the excessive verdict.

The rule of law in Missouri has been announced with wearisome repetition that the function or duty of granting a new trial rests peculiarly and specially within the sound discretion of the trial court, and unless it is manifest and apparent that its judicial discretion has been abused, or that injustice has been done, its ruling in that regard will not be disturbed by an appellate court. *Kuenzel v. Stevens*, 155 Mo. 280, 56 S. W. 1076; *Chouquette v. Railroad Co.*, 152 Mo. 257, 53 S. W. 897; *Lee v. Geo. Knapp & Co.*, 137 Mo. 385, 38 S. W. 1107; *Parker v. Casingham*, 130 Mo. 348, 32 S. W. 487; *Bank v. Wood*, 124 Mo. 72, 27 S. W. 554; *Hewitt v. Steele*, 118 Mo. 463, 24 S. W. 440; *McCullough v. Insurance Co.*, 113 Mo. 606, 21 S. W. 207; *Pice v. Evans*, 49 Mo. 396; *Reid v. Insurance Co.*, 58 Mo. 425; *Woodfolk v. Tate*, 25 Mo. 597; *Mason v. Onan*, 67 Mo. App. 290; *Powell v. Railway Co.*, 59 Mo. App. 335; *Ensor v. Smith*, 57 Mo. App. 584; *Longdon v. Kelly*, 51 Mo. App. 572. Circuit Courts are vested not only with the authority, but are charged with the duty, to supervise the verdicts of juries, and to grant new trials, if, in their judgment, the verdict is improper, or not sustained by the evidence. *Bank v. Wood* and *Reid v. Insurance Co.*, *supra*. The testimony offered strongly tended to establish that plaintiff, a peaceable, law-abiding citizen of high character,

without cause for suspicion, was unjustly denounced, and subsequently prosecuted, by defendant's servants, upon the charge of disturbing the peace, and his detention by them prior to arrest by the officer was attended by rough, insulting, and offensive conduct on their part toward him, wholly unprovoked, and which defendant made no effort to palliate, justify, or explain, and appears to have continued the perpetrators in its employ at the time of the trial of this cause. Assuming the verity of the evidence on behalf of plaintiff — which, as stated, defendant did not seek to deny — the plaintiff was entitled to liberal and full redress for the wrong done him, and the testimony authorized punitive damages as well as actual damages; but we cannot escape the conclusion that the jury permitted the sympathy aroused for plaintiff to outweigh its judgment in the return of a verdict for \$1,500 actual damages and \$1,000 exemplary damages. This court has quite recently had occasion to review actions for malicious prosecution. In the one, a verdict of \$2,000, equally divided by the jury as punitive and actual damages, was condemned as excessive and appearing vindictive, and \$1,000 adjudged full compensation to plaintiff for the actual damages suffered by him and sufficient punishment of defendant for the wrong committed. *Ruth v. Transit Co.* (Mo. App.), 71 S. W. 1055. In the other case a total finding of \$2,000 was made, of which \$375 was assessed as the punitive portion. This court required a remittitur of the excess of \$950 over \$500 upon the finding on the second count, stating that the latter sum would be adequate compensation for all the injury sustained. While the case under consideration appears to be distinguished from the above cases by circumstances of weightier aggravation inflicting more serious wrong on the plaintiff, yet we cannot dissent from the opinion of the Circuit Court that the verdict was excessive, and the Circuit Court performed its duty in setting it aside.

Judgment affirmed. All concur.

Kube v. St. Louis Transit Co.

(Missouri—Court of Appeals, St. Louis.)

1. **INJURY TO CHILD FALLING WHILE CROSSING TRACK.**¹—The plaintiff, a child of six years of age, while crossing the tracks of the defendant stumbled and fell, and one of the defendant's cars struck him, causing the injury complained of. It was held that the fall of the plaintiff on the tracks of the defendant was not necessarily the proximate cause of the accident. If the defendant was negligent in not using due care to avoid the accident, it will be liable for the resulting injury if the injured party himself was not guilty of negligence contributing to the accident.
2. **DEGREE OF CARE TO AVOID INJURY TO CHILDREN.**—The vigilance and activity obligatory upon a street railway company's servants to avoid injury to children are the same in degree as rest on them generally to avoid harm to persons in city streets; that is, ordinary vigilance and activity, not extraordinary. While less care for their own safety is exacted of young children than of individuals of full capacity, the general rule for measuring the care to be observed by others in such instances is not raised in favor of children.
3. **KNOWLEDGE OF FACTS AS AFFECTING DEGREE OF CARE.**—The degree of care required of street railway employees to avoid injuries to pedestrians in streets is such care as men of common prudence take when confronted by similar situations and conditions; not what men of extreme prudence might take. The precautions which a man of ordinary prudence will take to prevent an accident depends on his knowledge of the facts suggesting the probability of an accident ensuing, unless means are adopted to avert it. If a motorman knows a street crossing will be thronged with school children at a certain hour of the day, that fact

1. As to fall of child in attempting to cross track constituting proximate cause of collision, see *Sciruba v. Metropolitan St. Ry. Co.*, 2 St. Ry. Rep. 782, 87 App. Div. (N. Y.) 614, 84 N. Y. Supp. 85. For other cases reported in this series pertaining to the negligence of street railway companies in causing injuries to children upon tracks, see cases cited in note to *Jett v. Central Elec. Ry. Co.*, *ante*, p. 513. As to degree of care and diligence to be exercised in avoiding injury to children upon tracks, see *San Antonio St. Ry. Co. v. Mechler*, 5 Am. Electl. Cas. 585, 87 Tex. 628, 30 S. W. 899. See also in this volume, *McDonald v. Metropolitan St. Ry. Co.*, 2 St. Ry. Rep. 788, 93 App. Div. (N. Y.) 238, 87 N. Y. Supp. 699; *Forrestal v. Milwaukee Elec. Ry. Co.*, 2 St. Ry. Rep. 968, (Wis.) 97 N. W. 182; *North Chicago St. Ry. Co. v. Johnson*, 2 St. Ry. Rep. 82, (Ill.) 68 N. E. 463. As to duty generally of motormen to avoid collision with persons or vehicles upon or near tracks, see note to

should warn him of the danger of an accident, if he moves over the crossing at that hour without having his car under control; and if a child is injured by his running over the crossing at a high speed at the given hour, a question of fact arises as to whether he was negligent.

APPEAL by defendant from judgment for plaintiff. Decided December 15, 1903. Reported (Mo. App.) 78 S. W. 55.

Statement of facts by GOODE, J.

Plaintiff is a minor child, and was not quite seven years old when he received the injury which is the basis of this action. He was a student at the Ashland School in St. Louis, which is situate on the east side of Newstead avenue at the corner of Sacramento. About 800 children of ages ranging from six to fifteen years attended that school. It was the custom to have a policeman stationed at the locality at dismissal hours in order to protect the children from injury by street cars while crossing Newstead avenue, on which there are tracks. On the day the accident happened to plaintiff the police officer had been temporarily withdrawn from that station on account of an accident at the fair grounds. The boy Nicholas Kube was dismissed, along with a crowd of his school fellows, about half-past 3 o'clock in the afternoon, and the children hastened, as was their wont, in various directions; many of them, among whom was the plaintiff, crossing the street to the west side on the way to their homes. Plaintiff, while crossing the street, stumbled or fell on the track, and was struck by a car. But two persons besides the car crew, who were not called to testify, were eyewitnesses of the accident, and they were school children. One of them—Cecelia Spindler—told it as follows: "Q. When was the accident? A. The 7th of January, and I was just coming out of my room when I seen the little boy— Q. What time in the afternoon? A. About after 3 o'clock; just when school was letting out. Q. What room are you in? A. I am in 6. Q. What floor is that on? A. Third floor. Q. Where did you first notice Kube, this little boy, when you came out of school? A. I was going straight home, and he was running— Q. Where? A. He was running across the tracks. Then he just stumbled on the tracks, and hardly couldn't get up—the car was coming at such awful speed—he couldn't get up, and the car run over him. Q. Was the car coming fast or slow? A. Fast. Q. Did the motorman ring the bell? A. He rang the bell when he was right near him. Q. How close to the boy when he rang the bell? A. About six feet. Q. Did he ring the bell before that, that you heard? A. No, sir; I didn't hear him ring the bell. Just when he was trying to get by I heard the bell. Q. What became of the boy? Where did the car hit him? A. First it hit him in the leg; then he took a somersault; and when the car ran over him I seen him lying in the street there. * * * Q. Where was he when you first saw him? A. He was right crossing the street. Q. Which side of Sacramento, north or south? A. I think it was north. Q. North side of the street? A. Yes, sir. Q. From the east over toward the west side? A. Yes, sir.

Q. Was he in the street when you first saw him? A. Yes, sir; he was in the street, and he was running. Then he stumbled. Q. Was he running after anybody? A. I don't know if he was running after anybody. Q. Was anybody running after him? A. I don't know whether anybody was running after him. Q. As he ran across the street, you saw the car coming? A. Yes, sir. Q. You say he fell down? A. He fell down. Q. Where did he fall? A. On the car track. Q. Right in the middle of the car track? A. Yes, sir. Q. What part of the car hit him? A. The fender hit him first. Q. Where was he lying after the car struck him? A. In the middle of the track. Q. So the car must have run over him? A. Yes, sir. Q. Right square over him? A. Yes, sir. Q. Sure about that? A. Yes, sir. Q. How far away were you? A. I was about half a block away. I was standing at the crossing when it happened." Willie Vougst testified: "Q. Were you at school the day this little Kube boy got hurt? A. Yes, sir. Q. How long have you known this little Kube boy? A. About a month. Q. A month before the accident? A. Yes, sir. Q. Did you see him, on the day he was hurt, coming out of school? A. Yes, sir. Q. Did you see the car that struck him? A. Yes, sir. Q. Tell the jury just what you saw there. Where was the boy when you came out of the school? A. He was running across the street, and he stumbled, and the car came, and he rang the bell, but he couldn't get up in time and the car hit him. Q. How far was the car away from the boy when the motorman rang the bell? A. About eight feet. Q. About eight feet away? A. Yes, sir. Q. Did you hear him ring the bell before that? A. No, sir. Q. Was the car running fast or slow? A. Fast. Q. Where did the car hit this little fellow? A. Hit him on the leg first? Q. Where did it hit him next? A. He went under the car, and I didn't see him after that. * * * Q. Which crossing was he on, north or south crossing? A. He was on the south crossing. Q. On the south crossing? A. Yes, sir. Q. And he was running from the east over to the west side of the street? A. Yes, sir. Q. Did he fall before the car struck him or afterward? A. He fell before the car struck him. Q. Fell on the tracks? A. Yes, sir."

For the plaintiff the court instructed that the law required persons situated as Nicholas Kube was when and before the accident happened to exercise ordinary caution to avoid injury to themselves, and that the absence of such caution constituted negligence; but that in determining whether plaintiff was exercising such caution the jury should take into consideration his age and capacity; that if, in going on defendant's track, plaintiff was using the degree of care which, according to the ordinary experience of mankind, is to be expected of one of his capacity, he was not guilty of negligence. Further, that the law required the defendant company's servants to be watchful to see that the way was clear in the direction in which a car was going, and that where they had reason to anticipate the sudden and unexpected appearance of children on or approaching the track they should so manage the brakes and controller of the car as to be able to stop quickly and readily, if necessary; that if, under all the circumstances detailed in the evidence, the jury found there was reason to anticipate the sudden and

unexpected appearance of children on the track at the intersection of Newstead and Sacramento avenues, and that the defendant's servants in charge of the car were not so managing its controller and brakes as to be able to stop quickly should occasion require, and further found the injuries sustained by plaintiff were caused by the failure of defendant's servants to so manage said controller and brakes, their verdict should be for the plaintiff, unless they found the plaintiff himself was not using the degree of care to be expected of a boy of his age and capacity in the circumstances shown.

For the defendant the court instructed substantially as follows: That the burden was on the plaintiff to establish by the greater weight of evidence that the agents or servants in charge of the car were guilty of some act of negligence or want of ordinary care which was the direct, proximate, and efficient cause of the injury, and, unless plaintiff had so proven, he was not entitled to recover. That the mere fact of the accident was no evidence of negligence in itself, but, to find for the plaintiff, the jury must find that at the time of his injury defendant's servants were guilty of some want of ordinary care; that is to say, of doing some act which would not have been done by an ordinarily careful person in similar circumstances, or omitting some act that would not have been omitted by such a person in the circumstances. That, in order for the plaintiff to recover on account of the speed of the defendant's car, the jury must find it was being run at a speed which was negligent under the circumstances; or, in other words, at such a speed as a reasonably careful and prudent motorman would not have tolerated; and unless they so found plaintiff could not recover on the ground of excessive speed. That, in order to find for the plaintiff on the theory that the defendant's motorman, by the exercise of ordinary care, would have seen the plaintiff in time to stop his car and avoid a collision, the jury must find plaintiff was in a position of peril on or near defendant's track when the car was a sufficient distance away for the motorman, by the exercise of ordinary care, to have stopped or checked the car before it reached plaintiff. That the defendant was not required to sound the car gong at all times, and, in order to find for the plaintiff on account of failure, if failure there was, to sound the gong, the jury must find that an ordinarily careful motorman, situated as defendant's motorman was, would have sounded the gong on approaching Sacramento avenue. That, if they did so find, they could not return a verdict for the plaintiff for failure to sound the gong, unless they further found that such failure was a direct and proximate cause of plaintiff's injury. That, if the jury found from the evidence that plaintiff ran in front of defendant's car without warning, and under such circumstances as to make it impossible to stop the car and avoid a collision after the motorman saw, or by the exercise of ordinary care might have seen, plaintiff was about to place himself in contact with the car, the verdict must be for the defendant. That the absence of a policeman from the place could not make the defendant liable. That if the jury found the plaintiff failed to exercise the caution in caring for himself usually exercised by persons of his age, experience, and intelligence in respect to placing himself in danger, at a time when it was impos-

sible for the motorman to avoid injuring him by the exercise of ordinary care, plaintiff was not entitled to recover.

A peremptory instruction requested by the defendant was refused, as were others to the effect that there was no evidence to show the plaintiff was in a position of peril for a sufficient length of time for the motorman to have averted the collision by the exercise of ordinary care, that there was no evidence that the car was run at a negligent or careless rate of speed, no evidence that defendant failed to sound the gong, and that the jury could not find for the plaintiff on those grounds.

A verdict for \$1,000 was returned in favor of the plaintiff. Judgment was entered accordingly, and defendant appealed.

Jones, Jones & Hocker, for appellant.

Jos. A. Wright, for respondent.

Opinion by GOODE, J.

The point pressed on our attention is that on the whole evidence a nonsuit should have been ordered. The argument made in support of this proposition is based on the assumption that plaintiff was crossing the track far enough ahead of the car to have passed over safely if he had not fallen; hence the fall or stumble was the proximate cause of the accident; not negligence on the part of the motorman in running at too high speed, or failing to stop the car as quickly as possible after he discovered the danger of running over the boy. Several cases are cited in support of this point. *Barkley v. Railroad Co.*, 96 Mo. 367, 9 S. W. 793; *Boland v. Railroad Co.*, 36 Mo. 484; *Kennedy v. Railroad Co.*, 43 Mo. App. 1; *Kline v. Traction Co.* (Pa.), 37 Atl. 522; *Stabenau v. Railway Co.* (N. Y.), 50 N. E. 277, 63 Am. St. Rep. 698; *Fenton v. Railway Co.*, 126 N. Y. 625, 26 N. E. 967. We do not consider it so absolutely certain that plaintiff would have crossed the track safely, if he had not stumbled, as to preclude the possibility of a reasonable inference to the contrary. The testimony of the eyewitnesses is consistent with the theory that the boy was struck on the leg after he stumbled, but before he fell to the ground. One witness said the car first hit him on the leg, then he took a somersault, and when the car ran over him he was lying in the street. The other witnesses gave about the same version, saying the car hit him on the leg first, and he went under the car. True, this witness swore he

fell on the tracks before the car struck him, but the entire evidence allows the inference that plaintiff stumbled, and, before he could recover himself, was hit, and fell to the ground. He could hardly have been thrown a somersault if he was prostrate when first struck. What is controverted is the sufficiency of the evidence as a whole to raise an issue of fact for the jury's decision as to whether the plaintiff, despite his stumble or fall, could have been saved from harm if the car had been moving at what was a reasonable speed, considering the likelihood of children being in the street. If an individual, by some involuntary mischance, precipitates a casualty resulting in injury to himself, but was exposed to danger of the casualty by another's negligence, the law does not always construe his own mischance, instead of the prior negligence of the other party, to be the proximate cause of the injury, and shut him off from damages. Whether the injured party will be denied relief depends on whether he himself was guilty of negligence that proximately caused the harmful accident.

There are numerous negligences that only result in mishaps because of some incident, like the fall of this boy, but in which the negligence itself, and not the mishap which made it potent to do harm, was the proximate cause of the harm. In *Lore v. Manufacturing Co.*, 160 Mo. 608, 61 S. W. 678, the plaintiff, a girl of sixteen, slipped on the greasy floor of a factory, and as she fell thrust her arm into some insufficiently guarded cogwheels and gearing machinery, whereby it was crushed. The negligence of the defendant consisted in working the machinery without having the guards in good repair, as the statute required it to have. The contention was advanced that the girl assumed the risk of slipping on the floor, and could not recover; for, although the machinery was unguarded, she would not have been hurt but for her fall. In dealing with this contention the Supreme Court said the slipping was not the sole cause of the injury; which would not and could not have happened but for another cause — the insufficient guard around the gearing; and that, as plaintiff was in the exercise of ordinary care at the time she accidentally slipped, and would not have been hurt except for the unguarded machinery, she had a good case. A similar instance was *Musick v. Dold*

Packing Co., 58 Mo. App. 322. The plaintiff therein slipped on a piece of ice, or slippery floor, and was thereby caused to fall into a vat of hot water negligently left uncovered. The defendant complained of error because the court had refused an instruction that, if the plaintiff was injured by slipping, there could be no recovery, as to which the court said:

"Besides this, the negligence charged in the petition was that the defendant had maintained said vat in an unfinished and incomplete condition, etc. The facts embraced within the assumption of the instruction, if true, would not excuse the defendant from its liability to plaintiff for the injuries alleged to have resulted to plaintiff in consequence of the defendant's breach of duty. It is true that, if the plaintiff had not slipped, his limb would not have been plunged into the hot-water tank. It is equally true that, though he slipped, the disaster would not have overtaken him had not the tank been uncovered. The slipping was not the sole cause of the injury. The latter would not have occurred except for the presence and coexistence of both causes. The cause of the plaintiff's slipping was altogether accidental. If it was the sole cause of the injury, the defendant is not liable. But the injury would not have resulted had not another cause combined with the accidental cause. If the plaintiff was in the exercise of ordinary care and prudence at the time he slipped, and the injury is attributable to the absence of the cover over the tank, together with the slipping, then the plaintiff should recover. If the direct and proximate cause of the injury was the uncovered and unprotected condition of the tank, then plaintiff would be entitled to recover though the slipping of the plaintiff contributed to the injury."

The cases dealing with accidents to children on car tracks which we have cited from the defendant's brief are unlike this one, since the several casualties which gave rise to them occurred at points on streets where the carmen had no reason to anticipate the presence of a crowd of children, and, therefore, no reason to run their cars at less than the speed permissible elsewhere. In some of them the injured child had fallen on the track before the car reached it; but, whether that happened or not, the decision exonerating the railway company was based in every instance on testimony proving the child darted suddenly on the track when a car was approaching at considerable speed, and so near that it could not be stopped before reaching the victim. The vigilance and activity obligatory on the defendant's servants to avoid hurting the plaintiff were the same in degree as rest on it generally to avoid harm to persons in city streets; that is, ordinary vigilance and activity, not extraordinary. Although less care for

their own safety is exacted of young children than of individuals of full capacity, the general rule for measuring the care to be observed by others in such instances is not raised in favor of children. *Stanley v. Railroad Co.*, 114 Mo. 606, 21 S. W. 832. But, while only ordinary care must be taken by the servants of railway companies to avoid hurting pedestrians in streets, whether the pedestrians be children or adults, greater precautions are necessary in order to fulfill the rule in some instances than in others. The obligation imposed by the law is to take the care that men of common prudence take when confronted by similar situations and conditions; not what men of extreme prudence might take. *Frick v. Railway Co.*, 75 Mo. 595. What precautions a man of ordinary prudence will take to prevent a catastrophe depends on his knowledge of facts which suggest the probability of a catastrophe ensuing unless means are adopted to avert it, and suggest, therefore, as well the adoption of such means. *Bowen v. Railway Co.*, 95 Mo. 268, 8 S. W. 230; *Quirk v. Railway Co.*, 126 Mo. 279, 28 S. W. 1080; *King v. Oil Co.*, 81 Mo. App. 155; *Conrad Grocer Co. v. Railway Co.*, 89 Mo. App. 391. In *Frick v. Railway Co.*, *supra*, it was held that, although a railway company is bound to use ordinary care, both in the country and in towns, to avoid hurting travelers or running over them, greater pains are needed to comply with that legal requirement in towns than in the country, because the risk of such accidents is greater on city streets than on country roads. In *Stanley v. Railway Co.*, *supra*, which was an action for the death of a minor child, the above principles were declared; the Supreme Court saying of the rule requiring ordinary care: "It is one that enables each jury in each recurring case, to say, after a careful survey of all the facts, whether a party has used that care that an ordinarily prudent person would have used under similar circumstances. It is one that is susceptible of practical application. It furnishes the measure required by the law, and leaves to the triers of the fact the determination of the facts and fixing the liability under that rule. It is sufficiently elastic to meet the most aggravated case, or one containing the slightest negligence." The idea of notice, warning, or data of knowledge which will enable one using good judgment to anticipate a possible catastrophe deeply pervades the rules fixing the responsibility for

negligent torts. Indeed, one of the cardinal and general rules of the law of negligence is that the *quantum* of care to be observed and liability for its nonobservance are in proportion to the opportunity of forecasting danger and knowing the need of obviating it. In commenting on a case founded on an injury to a servant caused by the defective handhold of a freight car, in which the evidence showed the defect was invisible to one looking at the handhold, but that it bore signs of age and rust that might have warned the inspector of the importance of thorough scrutiny, the Supreme Court said:

"We cannot formulate any rule of law fixing definitely the standard of ordinary care. Every attempt to do it has resulted in failure. What is ordinary care in one case might be the grossest negligence in another. A mere glance at one handhold might indicate to an ordinary observer that it was safe; while on the other hand, a glance might discover its defectiveness; and again the conditions might be such that ordinary prudence would suggest and require a careful scrutiny."

Gutridge v. Mo. Pac. Ry. Co., 105 Mo. 520, 16 S. W. 943. It is clear that, though the varied facts of different situations may not alter the legal standard of care required to avoid an accident, they often multiply the precautions that must be observed to comply with the standard; that is, to satisfy the law. It is clear, too, that warning or foreknowledge plays an important part in fixing the responsibility of a person accused of negligently doing mischief. But the warning which fastens liability if mischief is not prevented, because it affords an opportunity to prevent the mischief, may be received in different ways. If the casualty was due to the collision of an electric car with a pedestrian, the motorman may have been warned by discerning the person walking on the track ahead of the car, or about to drive on it oblivious of danger, or lying asleep on it. In either of those emergencies, or others which may arise, the motorman must stop his car before reaching the exposed party, if he has time to do so after discovering the perilous position; as has been decided with wearisome repetition. That is equivalent to deciding that liability falls on street railway companies if a motorman operating one of its cars neglects to get the car under control as soon as he can after he knows, or ought to know, he must do so to save life or limb. *Aldrich v. Transit Co.* (Mo. App.), 74 S. W. 141. Now,

if a carman knows a street crossing will be thronged with school children at a certain hour of the day, that fact ought to warn him of the danger of a fatality if he moves over the crossing at that hour without having his car under control; and if a child is injured by his running over the crossing at a high speed at the given hour, a question of fact arises as to whether he was negligent. The situation suggests the danger, if we may adopt the language used in *Lore v. Manufacturing Co.*, *supra*. This seems to be the doctrine announced by the Supreme Court in *Schmidt v. Railway Co.*, 163 Mo. 645, 63 S. W. 834, 149 Mo. 269, 50 S. W. 921, 73 Am. St. Rep. 380 — which authority controls the present controversy. Its reasoning was carefully followed by the circuit judge in instructing the jury on the trial below, and in fact the main instruction given for the plaintiff is a copy of one approved in the *Schmidt* case. In that action it appeared a child of the plaintiff had been killed by a street car on a certain crossing in St. Louis while the car was running fast, at an hour when the crossing was usually filled with school children. The Supreme Court said:

"If the gripman had been on the lookout, as this instruction said it was his duty to have been, he would have seen those children on the sidewalk; and if, as he said, the buggy obscured his view, he ought reasonably to have apprehended that some were likely or liable to emerge from behind that obstruction when the crossing of Lemp avenue was reached; and, if he had been on the watch then, and holding his train in control, the probabilities are the child would not have been killed."

The operator of the car which struck the plaintiff was accustomed to that run, knew a swarm of children poured into Newstead avenue and over the crossing at the hour he was passing, and could see for a long distance that there was no policeman on guard as usual. The testimony of two eyewitnesses bore sufficiently on the speed of the car to warrant the inference that it was excessive, the facts considered, since both of them swore it was running fast, and one that it was running "awful fast." This evidence made an issue for the jury, and precluded the nonsuit of the plaintiff. In dealing with a similar litigation, the Supreme Court of Kansas said: "It would be difficult to conceive a more reckless act than that of driving street cars at a rate of twelve miles an hour into a swarm of school

children just as they were leaving school." The speed of the car in this case may not have been that high, but there was testimony for the jury as to whether or not it was higher than it ought to have been when the carmen knew little children would be in the street, and some of them heedless of danger.

The case was well tried, the instructions given for the defendant were liberal, and there was evidence for the jury as to whether the negligence of its servants was the proximate cause of the accident.

Judgment affirmed.

BLAND, P. J., and REYBURN, J., concur.

Linder v. St. Louis Transit Co.

(Missouri — Court of Appeals, St. Louis.)

1. **COLLISION WITH VEHICLE CROSSING TRACK; QUESTION OF NEGLIGENCE FOR JURY.**—Where it appeared that the plaintiff drove his vehicle across the tracks of the defendant, from a distance of twenty-five feet from the track in front of a street car approaching at about 200 feet distance at the time, and a collision occurred causing the plaintiff's injuries, the question as to whether under such circumstances the plaintiff was guilty of negligence in attempting the crossing was for the jury.¹
2. **INSTRUCTION AS TO ORDINARY CARE.**—The modification of an instruction requested by the defendant that "by 'ordinary care' as used in these instructions is meant such care as persons of ordinary prudence and caution would exercise in the same situation and under like circumstances" by adding thereto, "and the failure to exercise such care is negligence in the sense in which that term is used in these instructions," is not erroneous.

APPEAL by defendant from judgment for plaintiff. Decided December 15, 1903. Reported (Mo. App.) 77 S. W. 997.

Boyle, Priest & Lehman, for appellant.

P. P. Mason, for respondent.

Opinion by REYBURN, J.

This action for personal injuries was begun before a justice of the peace of the city of St. Louis, tried anew in the Circuit Court, and from judgment for plaintiff defendant has appealed.

1. As to driving on street car track in front of approaching car, see Roenfeldt v. St. Louis & Sub. Ry. Co., *ante*, p. 562.

About 5 o'clock in the afternoon of October 1, 1900, plaintiff, a physician, residing in East St. Louis, was in a bookstore on the south side of Pine street between Seventh and Eighth streets. An alley extends southwardly from Pine street between the streets named, and the store in question was a door or two west of the alley. Plaintiff emerged from the bookstore, deposited the books he had purchased in his buggy, which was in front of the store, turned toward the west with the horse not hitched. As he came out of the store he saw an east-bound car passing his vehicle, and before getting into the buggy he looked, and observed further eastward a west-bound car approaching Seventh street. After placing the books in his vehicle, he entered it, and started the horse, with the intention of crossing to the north side of Pine street and proceeding eastwardly. He passed the south track in safety, and was partially across the north track, when the west-bound car he had observed struck about the center of the rear wheel of the buggy, overturning it, and plaintiff, holding to the reins, was dragged a distance, variously estimated by different witnesses, before both conveyances were stopped. There was no proof of the distance between Seventh and Eighth streets, nor of the exact width of Pine street; but appellant in argument insists that the block lying between the first-named thoroughfares was an ordinary city block about 300 feet in length, and plaintiff estimated that his buggy had moved twenty feet from where it had been to the point of collision. The negligence averred in the complaint was the defendant's agents and servants in charge of the colliding car propelled same at a greater rate of speed than allowed by law and the ordinances of the city, and without giving notice of its approach to persons in front of said car by ringing the bell or going or attempting to check the speed.

1. It is urged that the imperative instruction asked at the conclusion of the testimony on behalf of the plaintiff should have been given, as the plaintiff's own testimony showed he was guilty of such contributory negligence as barred his recovery. Accepting, as we are bound to do, the plaintiff's statement for the purpose of considering this instruction, the colliding car was about 200 feet away, if east of Seventh street, when he entered his vehicle, and he had traversed about twenty feet, when the acci-

dent occurred by the rapid approach of the car and the neglect of its motorman to check its excessive speed. The court, in effect, is asked to declare that to attempt to move a buggy about twenty-five feet on a public highway, but across two street car tracks, on the more distant one of which a car was seen drawing near about 200 feet distant, imputes such contributory negligence to the driver as to preclude recovery by him if the car strikes his vehicle. Extended to its logical length, it follows from defendant's contention that it was the legal duty of plaintiff to have yielded the right of way to and permitted the car to pass, and that a car at a distance of 200 feet is not sufficiently far away to permit crossing before it, even in a vehicle, safely, and without being chargeable with negligence. As has been frequently adjudged, the use of the streets in a city by the public, whether in vehicles or on foot, and for the operation of electric cars, is concurrent, and the rights of the private vehicle and of the electric car thereon are equal, and each mode of conveyance must be driven and operated by those respectively in charge to avoid injury, and with reasonable regard for the safety of the other. The reciprocal rights and duties of the citizens and of those in charge of street cars in the common use of public streets has been clearly and forcibly defined in recent expressions of the Supreme Court of this State:

"This duty is just the same as between street cars and a citizen as it is between any two citizens when using a street. The traveling public has no right to demand such rapid transit on streets of a city as to amount to negligence in the running of the car. The citizen who is not in such a hurry, but is exercising ordinary care while upon the street, has rights that are just as sacred in the eye of the law as those of the hurrying crowds who demand such rapid transit; and if a street car company heeds the demands of the latter class, and thereby negligently injures the former, it must stand the consequences." *Schafstette v. Railroad Co.*, 74 S. W. 826.

And in an earlier case, approved in the last-quoted decision:

"The sum of the adjudicated cases bearing upon the relative rights and duties of street cars and citizens traveling in vehicles drawn by horses or other animals is that both have a right to use the street, but that neither has an exclusive right. The operator of a street car is not necessarily obliged to stop the car every time a horse shies or scares at the approaching car, but when the operator of the car sees that a horse is frightened at the car

it is his duty to manage his car in such manner as a man of ordinary prudence would do under the same circumstances, and it is always a question of fact for the jury whether such care in the running of the car has been observed. This duty may or may not lead to the necessity for bringing the car to a full stop. The duty of the company in this regard is just the same as the duty of one individual or citizen to another when they meet on the highway and the horse of the one becomes frightened at the vehicle of the other, or at anything upon the vehicle of another. Because a street car carries more people than any other kind of a conveyance, or because it is authorized to run more rapidly than a vehicle ordinarily can be legally driven, or because the rush and restlessness of the age make unreasonable demands for more and more rapid transit along the crowded thoroughfares of populous cities, it does not follow that a street car can be run in disregard of the rights of persons traveling by other means, nor that a street car company is exempt from the common-law duty of every one to exercise ordinary care, nor that it is only liable where the agents act wantonly, maliciously, and heedlessly." *Oates v. Railroad Co.*, 168 Mo. 535, 68 S. W. 906, 58 L. R. A. 447.

If defendant's motorman saw, or by the exercise of ordinary care could have seen, the peril of plaintiff, even though due in a measure to his own negligence, in time to have avoided the accident, plaintiff was entitled to recover. In any aspect of this case, it was for the jury, and not for the court, to say whether it was negligence in a citizen in daylight to drive about twenty-five feet to cross, in full view of the motorman, a street car track upon which a car was moving in his direction, but about 200 feet distant, although at a rapid rate of speed. Both the plaintiff and the motorman of defendant's car were bound to the exercise of due care to avoid the collision, and, as a general rule, which party to such a catastrophe was in fault is a practical question properly to be relegated to the jury for determination.

2. The charge to the jury was made up of three instructions for the plaintiff, four given by the court of its own motion, and six at the instance of defendant; the only instruction refused, other than the demurrer to plaintiff's evidence, which defendant presses should have been given, being the definition of ordinary care asked in the language following: "By 'ordinary care,' as used in these instructions, is meant such care as persons of ordinary prudence and caution would exercise in the same situation, and under like circumstances," which the court modified by adding thereto: "And the failure to exercise such care is negligence in the

sense in which that term is used in these instructions." The legal definition of negligence thus united to that of ordinary care in the form submitted by defendant did not impair the instruction, nor prejudice defendant in any wise; and appellant's strictures of other instructions we feel do not necessitate discussion. The instructions presented in clear and comprehensive manner the opposing theories of the respective parties, and the finding of the jury thereunder will not be disturbed.

Judgment affirmed.

BLAND, P. J., and GOODE, J., concur.

Other Cases in Missouri Courts of Appeals Not Reported in Full.

1. **COLLISION WITH VEHICLE; DUTY TO LOOK AND LISTEN; EXCESSIVE SPEED OF CAR; DUTY OF MOTORMAN TO STOP CAR.**—In the case of *Kolb v. St. Louis Transit Co.*, (Mo. App.) 76 S. W. 1050 (decided in the Court of Appeals at St. Louis), it appeared that the plaintiff, who was driving his moving van heavily loaded, stopped his team within a few feet of one of the tracks of the defendant to permit a car to pass thereon. As soon as the car had passed he looked both ways, but did not see nor hear a car approaching, and drove upon the defendant's other track. When the front wheels of his wagon struck the track he heard the noise of a car, and looking in its direction saw it approaching at a distance from him of about 200 feet. Thinking that he could cross the tracks safely he whipped up his horses, but failed to get across in time to avoid a collision. The rear wheel of his van was struck, the van was injured, one of his horses was killed, and he himself was badly and permanently injured. From the plaintiff's evidence it appeared that the car was running at a speed of from fifteen to twenty miles an hour; that it was from 200 to 250 feet west of the crossing where the collision occurred when the plaintiff's horses were on the track; and that the car could have been stopped or checked in time to have avoided the collision, but no effort was made by the motorman to stop the car until it was within fifteen or eighteen feet of the wagon, when it was too late to avoid the collision. On the part of the defendant the evidence tended to show that the plaintiff did not look or listen before going upon the track, that the car was traveling at a rate of speed not exceeding eight miles an hour, that the motorman sounded his gong from the time he first saw the plaintiff approach the track, and that he did everything in his power to stop the car. The jury awarded the plaintiff damages in the sum of \$2,500, from which the defendant appealed.

It was held (1) that under the evidence it was for the jury to say whether the plaintiff looked and did not see the car at the time he drove upon the track, or whether, without looking, he drove upon it; (2) the plaintiff's evidence tended to show that the car was running at a prohibited rate of speed, to wit, at from fifteen to twenty miles an hour; this was negligence *per se*, and the reasonable inference from this evidence, and from the fact that the car was from 200 to 250 feet away when plaintiff drove on the track, is that, had the car been running at a lawful rate of speed, plaintiff would have cleared the track before the car arrived, and the accident would not have happened; (3) if, as appears from the plaintiff's evidence, the car was from 200 to 250 feet distant when the plaintiff's horses were on the track, it was the duty of the motorman to have seen the perilous situation of the plaintiff, and to have stopped the car in time to avoid the collision, and his omission to do so was the proximate cause of the injury, while the act of the plaintiff in driving on the track without looking or listening did not necessarily produce the injury, and was not the proximate cause thereof, though the injury could not have occurred, had he not driven on the track; according to the plaintiff's evidence the motorman had the last fair chance of avoiding the injury and is not excused by the prior negligence of the plaintiff; (4) an instruction which required the motorman in charge of the car to keep a vigilant watch for other vehicles, and on the first appearance of danger to stop or check his car in the shortest time and space practicable, was not erroneous as requiring too high a degree of care. The judgment in favor of the plaintiff was affirmed.

2. COLLISION WITH VEHICLE DRIVEN ALONG TRACK; DUTY OF MOTORMAN TO AVOID COLLISION; NEGLIGENCE OF DRIVER OF VEHICLE NOT IMPUTABLE TO PLAINTIFF RIDING WITH HIM.¹—In the case of *Baxter v. St. Louis Transit Co.* (Mo. App.), 78 S. W. 70, the plaintiff sued to recover damages for injuries to his son caused by the negligence of the defendant company's servants in the management and operation of one of its street cars. The plaintiff's son was in the employ of an ice dealer. It was his duty to ride upon the ice wagon and carry ice from the wagon to such houses as the driver of the wagon should direct. The ice wagon was being driven near the north rail of the north track on the street where the collision occurred, and a car running west on the north track struck the hub of the rear wheel of the wagon with such force as to throw the boy and the driver into the street. The boy fell in front of the wagon and one of its wheels passed over his left leg and broke it. The boy at the time was riding on the seat of the wagon with the driver. The wagon was covered with canvas but was so constructed as to enable persons sitting on the seat to look behind. The plaintiff's son testified that the wagon was moving

1. See note to *United Rys. & Elec. Co. v. Biedler*, *ante*, p. 391.

slowly and that he could see back of the wagon for about 1,000 feet, and that he looked back for a car, but saw none, and that the wagon was struck by a car coming from behind about 300 feet from the point where he looked. It was insisted by the defendant that the boy's evidence was opposed to some of the physical facts shown in the case and was, therefore, not entitled to credence. It was contended that the car could not have run 1,000 feet while the wagon was going 300 feet, and that if the boy looked when he said he did, he must have seen the car. But the court said: "We see nothing improbable in the statement of the boy, even if it is conceded that the car ran 1,000 feet while the wagon was moving only 300 feet, hence we cannot say that his testimony in respect to looking back and not seeing the car is opposed to the physical facts."

The defendant's evidence was to the effect that a car traveling east on the south track passed the wagon just before it was struck. The boy testified that he did not see that car. It was held that the boy's testimony was not opposed to the physical facts, since the car might have passed and not have been seen by him.

The evidence tended to show that the motorman in charge of the car by the exercise of ordinary diligence could have stopped his car before the collision, and thus have avoided the accident. The failure so to do was the proximate cause of the injury, and constituted negligence for which the defendant is liable, notwithstanding the fact that both the driver and the boy were guilty of negligence in failing to look back for a car after the wagon had been placed in a perilous position. The court said: "The principle of law in such circumstances is that the party who has the last opportunity to avoid the accident is not excused by the negligence of any one else."

It also appeared that the boy did not hear the bell of the car; that had it been sounded he would have heard it; and the evidence further shows that the motorman saw or by the exercise of due diligence could have seen the wagon moving along in dangerous proximity to the track. Under these circumstances it was his duty to have sounded the bell in time to allow the driver to pull away from the track. His failure to do so was negligence.

The evidence further showed that the plaintiff had nothing to do with the driving and had no control over it. He and the driver, therefore, were not engaged in a joint enterprise in such sense that the driver's negligence could be imputed to him. His duties were entirely distinct from those of the driver and he could not possibly influence the driver's course by any authority he had over him, and should not be responsible for the driver's negligence. The judgment for the plaintiff in the sum of \$2,000 was held not excessive, it appearing that \$500 had been expended for medical services and that the broken leg was permanently crippled, so that the boy was lamed for life.

3. COLLISION WITH VEHICLE; CONTRIBUTORY NEGLIGENCE.²—In the case of *Gettys v. St. Louis Transit Co.* (Mo. App.), 78 S. W. 82, the plaintiff drove a vehicle upon the track of the defendant and stopped thereon in front of a car which she saw approaching, for the purpose of permitting another person to get into the vehicle. The evidence tended to show that when she drove upon the track the car was not more than thirty-five feet away, and that it was approaching at an ordinary rate of speed. The plaintiff herself testified that she saw the car before she drove on the track. It was held that the plaintiff's contributory negligence precluded her recovery.

The plaintiff contended that notwithstanding her contributory negligence the defendant's motorman could have avoided the accident by the exercise of due care, and that for a failure to exercise such care she should be permitted to recover. In considering this question the court said: "What the plaintiff relies on is that the motorman failed to obey the vigilant watch ordinance, which requires carmen to keep watch for persons and vehicles approaching a track, and stop the car in the shortest time and space possible on the first appearance of danger to such person or vehicle. This ordinance does not exonerate the plaintiff from all responsibility for her own negligence in the circumstances stated. One cannot deliberately and advisedly place himself in a position which makes a collision with a street car imminent, retain the dangerous position until the collision occurs, and then get damages on account of the negligence of the carmen. *Moore case*, 1 St. Ry. Rep. 492, 75 S. W. 672, *supra*. We do not mean to say that even in that state of facts carmen owe no duty to the endangered person on the score of humanity, or that they may run him down; but we do mean to say that willfulness or wantonness on the part of carmen must be shown, to make a case in favor of a plaintiff, when the latter has so behaved. The case was not tried on the theory of willful tort, and, indeed, the car stopped simultaneously with the collision, which goes to show that the motorman, instead of disregarding plaintiff's peril when he discerned it, tried to avoid hurting her. The witness Scott, who in most respects testified like the plaintiff, differed from her as to the distance the car was from the buggy when the buggy first stopped on the track. He estimated it to be from 150 to 200 feet, and this testimony is insisted on by plaintiff's counsel as authorizing the inference that the car could have been stopped before striking the buggy. If we take the whole of Scott's testimony, it shows even worse recklessness on the part of plaintiff than her own does, for he testified that she not only stopped on the track, but, on starting again, drove fifteen or twenty feet toward the approaching car, instead of driving off. However, suppose the car was that distance away when the buggy stopped; she was looking right at it. Did the motorman have any reason to suppose

2. See note to *Roenfeldt v. St. Louis & Sub. Ry. Co.*, *ante*, p. 562.

she would not drive off, and was he bound to check the car that distance away? Her buggy was light, and could be quickly and easily driven out of the way. Vehicles are constantly on tracks that far ahead of cars, and are as constantly turned off without injury. This case is wholly unlike those in which plaintiffs were driving along the tracks ahead of cars, but unconscious of their approach. This plaintiff did nothing to save herself, but relied on the motorman to stop the car. She was neither alarmed nor confused. Both in the Moore and Zumault cases the doctrine was laid down that if a party is conscious of impending danger, and makes no effort to shun it, when he might easily do so, his own carelessness is an active cause in producing any injury he receives, and bars recovery. Passages from text-writers are quoted at length in the opinion in the Moore case, and, without again quoting them, we will simply refer to that authority and the citations: 7 Am. & Eng. Encyc. Law (2d ed.), 385; Cooley Torts (2d ed.), 812; Nellis Street Railways, pp. 383, 384. Perhaps we had better quote the rule as stated by one of those writers, and we select Judge Cooley's text. He says: "Regarding the case of a negligent injury, the general result of the authorities seems to be that if the plaintiff or party injured by the exercise of ordinary care under the circumstances, might have avoided the consequences of defendant's negligence, but did not, the case is one of mutual failure, and the law will neither cast all of the consequences upon the defendant, nor will it attempt any apportionment thereof."

A judgment for the plaintiff was reversed.

4. COLLISION WITH VEHICLE DRIVEN ALONG TRACK; DUTY TO LOOK BEHIND; INSTRUCTION AS TO EXERCISE OF CARE BY RAILROAD EMPLOYEES TO AVOID COLLISION.—In the case of *Twelkemeyer v. St. Louis Transit Co.* (Mo. App.), 76 S. W. 682, it appeared that the plaintiff was driving a one-horse car along the tracks of the defendant; when he drove upon the track he looked to the north and south and saw no cars. He drove along the track for some distance and hearing a car approaching from the rear, he whipped his horse to full speed without leaving the track until he observed a car approaching upon the other track. He attempted to turn from the track to the roadway and his cart was struck from the rear, the horse was fatally injured, the cart demolished, and the plaintiff himself severely injured. Both the cars were running at a high rate of speed, variously estimated at from twenty to twenty-five miles an hour. The defendant's testimony tended to show that the cars were well lighted, their headlights burning, the gongs vigorously and continuously sounded by reason of the darkness of the street and the standard of speed prescribed by city ordinance was not exceeded.

It was contended by the defendant that the plaintiff was guilty of contributory negligence in failing to look back from time to time while he was driving along the track, and in not driving directly from the

track when he discovered the approach of the car from the rear. It was held that under the facts as they appeared in the case, the question as to whether the plaintiff was guilty of contributory negligence was for the jury; the mere driving upon the defendant's tracks at night was not alone such contributory negligence as would defeat his recovery. The court said: "The imminent danger was upon him, and assuming as he rightfully might that the car in his rear was being operated in obedience to, and not in violation of, the ordinance governing its rate of speed, and with the south-bound car nearing him at a rapid rate, without time for calm deliberation, impelled by the natural instinct of self-preservation, he might justly conclude that his best chance, if not his only hope, of escape, was by urging his horse to greatest speed, pass the blocked-up part of the roadway, and turn off into the unobstructed roadway east of the railway track. In any aspect, the question whether, in view of the grave perils confronting him, he adopted the course of a man of ordinary prudence, was properly submitted to the jury." Citing *Donohue v. Railway Co.*, 91 Mo. 357, 2 S. W. 424, 3 S. W. 848; *Kleiber v. Railway Co.*, 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613.

An instruction to the effect that if the jury believe from the evidence that the servants of the defendant carelessly and negligently ran the cars upon the plaintiff's team, and that by the exercise of ordinary care they could have avoided doing so, and that such negligence, and not negligence on the part of the plaintiff was the cause of the injuries to plaintiff, they should find for the plaintiff was upheld, and the contention of the defendant that such instruction was too general and sanctioned a finding for the plaintiff, if the jury found any negligent conduct in the operation of the cars, was not sustained.

5. COLLISION WITH VEHICLE; RIGHT TO DRIVE ALONG STREET RAILWAY TRACK; DUTY TO SOUND GONG; QUESTION OF CONTRIBUTORY NEGLIGENCE FOR JURY.—In the case of *Buren v. St. Louis Transit Co.* (Mo. App.), 78 S. W. 680, it appeared that the plaintiff was driving along the street railway tracks of the defendant in the evening of a very dark night. A car approaching from the rear struck the wagon in which he was driving and threw him to the ground, severely injuring him. It appeared that the car proceeded some fifty or sixty feet after it had collided with the wagon. The plaintiff and his two companions riding with him in the wagon testified that there was no light in the car, that there was no headlight, and the gong or bell was not sounded, nor any warning whatever given of its approach. The defendant's evidence as to the existence of a headlight, and the giving of warning by sounding a gong, conflicted with that of the plaintiff.

It was contended by the defendant that the court should have instructed that "under the law and the evidence the plaintiff is not entitled to recover;" but the court held that if the evidence of the plaintiff be true the defendant's motorman and conductor were guilty of

gross negligence, and the only theory upon which the instructions in the nature of a demurrer to the evidence should have been given was that all the evidence shows conclusively that the plaintiff was guilty of negligence which directly contributed to his injury. In connection with the question as to the plaintiff's negligence, the court said: "The plaintiff had a right to drive on the defendant's railway track, if in doing so he did not unnecessarily interfere with the operation of cars on the track. *Oates v. Railway Co.*, 168 Mo. (loc. cit.) 544, 68 S. W. 906, 58 L. R. A. 447; *Degel v. St. Louis Transit Co.* (Mo. App.), 74 S. W. (loc. cit.) 157; *Kolb v. St. Louis Transit Co.* (Mo. App.), 76 S. W. 1053. Negligence, therefore, cannot be imputed to him from the mere fact that he was driving on the track; nor do we think that a court can, as a matter of law, say that he was guilty of such negligence as to bar recovery from the fact that he drove on the track at a rapid speed, in the night-time, when it was very dark. It was the duty of the defendant to have its cars so lighted as to be seen a safe distance by persons using the street, or to sound the gong or give some warning of its approach to enable persons to keep out of its way. *Noll v. St. Louis Transit Co.* (Mo. App.), 73 S. W. 907; *Klockenbrink v. Railway Co.*, 172 Mo. (loc. cit.) 689, 72 S. W. 900; *Gratiot v. Railway Co.*, 116 Mo. (loc. cit.) 464, 21 S. W. 1094, 16 L. R. A. 189; *Dahlstrom v. Railway Co.*, 108 Mo. (loc. cit.) 536, 18 S. W. 919; *Conrad Grocer Co. v. Railroad Co.*, 89 Mo. App. (loc. cit.) 397. Plaintiff had a right to rely on the performance of this duty by the railway company, and to assume that, if a car was approaching him from the north, it would have a headlight by which it could be seen, or the gong would be sounded to give warning of its approach in time to allow him to move off the track in safety. We do not hold that the evidence does not tend to show that plaintiff was guilty of negligence that directly contributed to his injury. In fact, we think the preponderance of the evidence is that way. But it is not all that way, and when there is evidence pro and con on an issue of fact on trial it is for the jury to pass upon its probative force; and when they have done so, and the trial court has approved their finding by overruling the motion of the losing party to set aside the verdict, that issue of fact is not open to review by an appellate court."

A judgment for the plaintiff was affirmed.

6. COLLISION WITH VEHICLE CROSSING TRACK;³ DUTY TO LOOK AND LISTEN; CONTRADICTION PHYSICAL FACTS.—In the case of *Barrie v. St. Louis Transit Co.* (Mo. App.), 76 S. W. 706, it appeared that as the plaintiff was driving across the tracks of the defendant, the rear wheels of his wagon were struck by one of the defendant's cars, and the wagon was overturned and the plaintiff thrown out and injured. It appeared from the plaintiff's evidence that he drove out of an alley about the middle of a block on the street in which the defendant's tracks were

3. See note to *Chicago City Ry. Co. v. O'Donnell*, *ante*, p. 170.

laid; that when he had cleared the building line in driving on the street he looked north and south but saw no car approaching, and then drove straight across the street; that after he had gone upon the track he saw a car coming close upon him and attempted to drive from the track, to avoid a collision, but before he could do so his wagon was struck. After he had got on the street there were no obstructions to his view for a distance of over 200 feet. He was unable to give any explanation or reason why he did not see the car which was within less than 200 feet of him when he first drove on the street. The court held that from the undisputed physical facts the testimony of the plaintiff should not be believed since such facts show that if he had looked he must necessarily have seen the approaching car; such evidence is, therefore, without any probative force, and should have been withdrawn from the consideration of the jury.

There was some evidence that the motorman in charge of the car was negligent in failing to keep a vigilant watch ahead of him, and thus observe the plaintiff's perilous position in time to have stopped his car and avoided the collision. If the motorman was guilty of such negligence, the defendant was liable, notwithstanding the fact that the plaintiff drove upon the track without looking or listening for an approaching car. But if it appeared that the plaintiff drove upon the track so near to the approaching car that it could not be stopped in time to avoid a collision, the defendant was not liable notwithstanding the motorman's negligence. In such circumstances both parties would be guilty of negligence, and the plaintiff would not be entitled to recover for the reason that there is, in this State, no such thing as comparative negligence, and where the negligence of both parties contributes to produce the injury, the plaintiff cannot recover. Citing *Holverson v. Railway Co.*, 157 Mo. 218, 57 S. W. 770; *Peterson v. Railway Co.*, 156 Mo. 552, 57 S. W. 709; *Vogg v. Railway Co.*, 138 Mo. 172, 36 S. W. 646; *Boyd v. Railway Co.*, 105 Mo. 371, 16 S. W. 909; *Butts v. Railway Co.*, 98 Mo. 272, 11 S. W. 754; *Yancy v. Railway Co.*, 93 Mo. 433, 6 S. W. 272; *Powell v. Railway Co.*, 76 Mo. 80. It was further held that where one driving a vehicle and approaching a street railway track sees a car approaching, but continues on his course, without again looking to see whether he can safely cross, he is guilty of contributory negligence precluding recovery.

An instruction that if the defendant's motorman could have averted the accident after discovering the plaintiff's peril, but failed to do so, the defendant was liable irrespective of whether the plaintiff exercised care to look out for the car, if he exercised ordinary care to avoid the accident after he became aware of his danger, was erroneous, where it appears from the physical facts that the evidence of the plaintiff to the effect that upon approaching the tracks he looked for a car, but did not see one until the front wheels of his wagon were on the track, was not to be believed; such an instruction left out of view this very im-

portant and damaging phase of the evidence, and authorized a recovery upon the assumption that plaintiff was guilty of no contributory negligence, provided he used due diligence to get over the track after the front wheels of his wagon were on it, when, as he says, he first discovered the car was coming and close upon him.

7. COLLISION WITH VEHICLE CROSSING TRACK; DUTY OF MOTORMAN TO AVOID COLLISION.—In the case of *Moritz v. St. Louis Transit Co.* (Mo. App.), 77 S. W. 477, it appeared that the plaintiff's team of horses and wagon were injured by a collision with an electric car belonging to the defendant and operated by its servants. The team was being driven along the street in which the defendant's tracks were laid and was turned to cross the tracks and had crossed the east track and stopped on the west one when the car struck the wagon pole and one of the horses, causing the injury. As the driver turned upon the track the car which hit the team was 500 feet or more away. No gong was sounded or warning given by the motorman. The car was running at an excessive rate of speed, equaling, according to the evidence, at least eighteen miles an hour. The witnesses agreed that the motorman made no effort to stop the car until the instant of the collision, although according to their testimony he must have observed the approach of the team toward the track on which the car was running when he was more than 500 feet away, and that the driver intended to cross that track. Under such circumstances it was held for the jury to determine whether by prompt and active measures the motorman could have checked the car in time to prevent the collision. The distance between the car and the wagon was great enough to support the inference that the former could have been stopped by proper effort before harm was done. Citing *Schafstette v. St. Louis & Meramec Ry. Co.*, 1 St. Ry. Rep. 434, 74 S. W. 826.

8. COLLISION WITH VEHICLE CROSSING TRACK; NEGLIGENCE OF PARTIES TO BE DETERMINED BY JURY; SPEED TO BE REGULATED SO AS TO AVOID COLLISION.—In the case of *Hanheide v. St. Louis Transit Co.* (Mo. App.), 78 S. W. 820, it appeared that the plaintiff was driving a team hauling a heavy wagon, and in crossing the tracks of the defendant at a street intersection the rear of his wagon was struck by one of the defendant's cars and he was thrown off and injured. Before crossing the track he looked for approaching cars and saw the car which struck him at a distance of about 230 feet. The motorman approached with unabated speed, and the plaintiff whipped up his team so as to avoid the collision. The car was approaching at a rate of ten or twelve miles per hour. The motorman made no effort to check the speed until within about ten or fifteen feet from the wagon. There was no obstruction and the plaintiff saw the car plainly when he drove upon the track. The defendant interposed the defense of contributory negligence and the plaintiff's denial in his reply presented such an issue. It was held that the defendant was entitled to an instruction as to the contributory negligence of the plaintiff, and an instruction requiring that such neg-

ligence in order to be a defense should be the sole and direct cause of the accident was erroneous. It was also held that it devolved alike on the plaintiff and the motorman of the defendant to exercise due care to avoid the impending collision, and it was for the jury and not the court under the facts and circumstances presented to determine which party was at fault. No particular rate of speed can be deemed lawful at a crossing or intersection of public streets, regardless of the conditions and circumstances that confront the motorman at the time, and where a motorman discovers that a vehicle is negligently approaching a crossing, it becomes his duty to regulate the speed of his car, if in his power, so as to avoid the infliction of an injury, if it could be avoided by the adoption and exercise of reasonable care and caution. Owing to the error in the court's instruction as to contributory negligence the judgment in favor of the plaintiff was reversed.

9. COLLISION WITH VEHICLE DRIVEN FROM A DRIVEWAY ONTO STREET-CAR TRACKS;

FAILURE TO LOOK; DUTY OF MOTORMAN TO AVOID COLLISION.—In the case of *Fellenz v. St. Louis & Suburban Ry. Co.* (Mo. App.), 80 S. W. 49, the following facts appeared: The plaintiff conducted a dairy and coal business on his premises. The defendant owned and operated a double street railroad track running north and south over its private right of way, crossing the street where the accident occurred at right angles. There was a driveway leading from the plaintiff's land to the street across which the defendant's tracks were laid. The plaintiff drove the vehicle in which he was riding from his premises upon the driveway into the street, and when near the middle of the street turned to cross the defendant's tracks. Before he could clear the track a car approaching upon the defendant's tracks struck the rear wheel of his vehicle, threw him out, and seriously injured him. As he drove onto the street he checked his horses to avoid collision with pedestrians passing along the street. The plaintiff's testimony was to the effect that he did not see the car approaching because of small trees and weeds growing upon his land, but from the physical facts it appeared that had he looked he could have seen the approaching car. There was also evidence to the effect that the motorman did not sound the car bell until just before the car struck the wagon. The plaintiff's testimony tended to show that the car was running at the time at a speed of twenty miles an hour. The court held that since it appeared from the evidence that the plaintiff's attention was directed to the pedestrians whom he attempted to avoid as he drove from his premises onto the street, and that he did not, therefore, look or listen for an approaching car before driving upon the track, he was guilty of contributory negligence which precluded his right to recover, unless the evidence showed, or tended to show, that after he was in a position of peril the motorman who saw him could have stopped or checked the car in time to have prevented the collision. The evidence in respect to the acts of the motorman in attempting to avoid the collision was considered, and it was held that

the conclusion therefrom was irresistible, that there was not time and space sufficient to stop the car in time to have averted the collision after the motorman saw the plaintiff driving upon the track. The application of the last fair chance doctrine was, therefore, excluded, and the court said: "The case presents a state of facts from which it is shown that plaintiff was negligent in driving on the track without looking or listening for an approaching car, and the defendant was negligent in failing to sound the bell as the car approached the crossing, and perhaps, also, negligent in running the car at an excessive rate of speed, and by reason of the concurring negligence of both parties the car collided with the wagon, causing the injury complained of. In such circumstances (that is, where the negligence of both parties contributed to cause the injury complained of), the law is well settled that plaintiff cannot recover." Citing *Moore v. Railway Co.*, 176 Mo. 544, 75 S. W. 672; *Davies v. Railway Co.*, 159 Mo. 1, 59 S. W. 982; *Holwerson v. Railway Co.*, 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850; *Rice v. Railway Co.*, 92 Mo. App. 35. The judgment for the plaintiff was reversed.

10. **COLLISION WITH PEDESTRIAN AT CROSSING; FAILURE TO LOOK AND LISTEN; EXCESSIVE SPEED OF CAR.**—In the case of *Fanning v. St. Louis Transit Co.* (Mo. App.), 78 S. W. 62, the evidence tended to show that the plaintiff when fifteen or twenty feet from a street crossing noticed a street car approaching at a short distance, but notwithstanding went upon the track and did not notice the car again until she had reached the middle of the track. It was held that she was guilty of contributory negligence. The fact that at the time the accident occurred the car was running at an excessive rate of speed would not justify the negligence of the plaintiff in failing to look for the approach of the car before stepping upon the track, and would not relieve her from the effect of her contributory negligence. A judgment for the plaintiff was reversed.
11. **INJURY TO PEDESTRIAN CROSSING IN FRONT OF CAR; DUTY OF MOTORMAN TO EXERCISE CARE TO AVOID COLLISION; CONTRIBUTORY NEGLIGENCE.**—In the case of *McLeland v. St. Louis Transit Co.* (Mo. App.), 80 S. W. 30, it appeared that the plaintiff in attempting to cross a street stepped in front of a car which had stopped to let off passengers, and was struck by the car suddenly starting, throwing her to the ground and causing the injuries complained of. The plaintiff testified that the car started without any signal to her that it was about to move. The street was crowded at the place where the accident occurred. The court stated that it was no unfair deduction from the evidence that the motorman saw or should have seen the plaintiff's effort to get by the car, and that it was not negligence *per se* for a pedestrian to attempt to pass in front of a nonmoving car in plain view of the attendant in charge, especially in a street frequently and constantly used by pedestrians and by vehicles of every kind. The court said: "The defendant's motorman should have exercised a degree of care commensurate with the conditions attending the passage over the street by his car,

being imputed the knowledge that the vigilance that might have sufficed in the less populous and traveled parts of the city would fall far short of constituting ordinary care in such thronged portions, frequented by the public about the retail stores of the city, and where, indeed, the watchfulness exacted would vary at different hours of the day, and even on different days of the week. Under such state of facts, where reasonable men might fairly differ in their conclusions, the question of due care or negligence on plaintiff's part was relegated to the jury." The defense in this case being that the car was moving, and that the plaintiff was negligent in stepping immediately in front of it, the defendant was entitled as a matter of lawful right to have the jury informed by a sharply defined and concise instruction, without qualification or obscurity, that if her injuries resulted from the concurrent and mutual negligence of both herself and the corporation defendant, the latter was not responsible to her therefor. It is not sufficient for the court to instruct the jury that the burden throughout rested upon the plaintiff to show that her injuries were caused solely by the negligence of the defendant, and without fault or negligence on her part. It is error for the court to modify an instruction to the effect that the jury should find for the defendant if they believe from the evidence that the motorman could not have stopped the car after he either saw or could have seen by using ordinary care that plaintiff was in a position of danger." A judgment for the plaintiff was reversed.

12. INJURY TO PASSENGER ALIGHTING IN AN UNSAFE PLACE.⁴—In the case of *Lynch v. St. Louis Transit Co.* (Mo. App.), 77 S. W. 100, it appeared that the plaintiff, a passenger on one of the defendant's cars, after having signaled to the defendant's servants to stop the car at a street crossing the car proceeded a short distance beyond the place where it customarily stopped, and the plaintiff in alighting at such place sprained the muscles of her leg. The place where she alighted was shown to have been rough and uneven, although apparently safe. The court held that the negligence of the defendant's servants in failing to stop at the usual place of stopping was not the proximate cause of the injury. The principal question to be determined in the case was whether there was evidence from which the jury could rightly deduce the inference that the place where the plaintiff was discharged was unsafe, or that the defendant ought to have foreseen there was danger of an accident if she was discharged there. The court in considering this feature of the case said: "She was willing to get off at that point, and waived the inconvenience incident to being carried past the crossing. The spot where she stepped to the ground appears to have been as safe as the crossing itself, or safer; for, instead of a downward step, she had to take a horizontal one. The time was just after noon, when every feature of

4. As to passenger carried beyond destination, see note to *Haley v. St. Louis Transit Co.*, *ante*, p. 548.

the ground was visible. One may slip or wrench a muscle by stepping on a slightly uneven surface, small pebble, or other body in the street at any point; but the occurrence of such an accident does not necessarily authorize an inference of negligence on the part of any one. *Henry v. Railway Co.*, 113 Mo. 525, 21 S. W. 214; *Ward v. Andrews*, 3 Mo. App. 275. And the particular accident under investigation presents no characteristic which bespeaks either that the defendant was negligent in selecting a landing place for the plaintiff, or even that the place selected was unfit. The occurrence rather falls in the category of pure accidents, for which, as human ken cannot embrace them, nobody is to blame. Blame for an accident attaches only when it was one to be foreseen and averted by the exercise of the degree or *quantum* of care which the law exacted of the parties concerned in the situation and relationship they were in at the time. *Fuchs v. St. Louis*, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136; *Sullivan v. Railway Co.*, 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167; *Bowen v. Railway Co.*, 95 Mo. 268, 8 S. W. 230; *Waller v. Railway Co.*, 59 Mo. App. 410; *Banks v. Railway Co.*, 40 Mo. App. 458. In this case the law imposed on the car crew the duty of exercising that high vigilance to prevent injury to the plaintiff which very cautious railway men are wont to exercise. If the place chosen for the plaintiff to land was safe, the carmen fully performed their duty, high though it was. As indicated, the fact that plaintiff got hurt as she did does not by itself justify the conclusion that the place was unsafe. The injury was a singular one, and is really unaccounted for by the evidence. If due to the unevenness of the ground where she stepped, the risk was of a trifling character, and no greater than is constantly encountered with impunity by multitudes of men every day. In some way she sprained her foot or leg severely as she stepped from the car; but there was nothing about the place where she alighted which suggested to her, or any one who saw it, that an injury was likely to happen in getting off there. She testified she saw no danger; that she took an easy, natural step, nearly straight out from the lowest step of the car, and that the instant she put her foot on the ground a violent pain struck her. Her sister testified the same way concerning the apparent safety of the place; and all the testimony shows there was no risk, or even the least difficulty, in getting off a car there. The accident thus plainly presents itself as the result of pure chance, into which no blamable human agency entered as an active cause. The defendant cannot be held answerable from the fact that plaintiff got hurt in leaving its car while the car was standing at a safe place, although that place was a short distance from the one where passengers usually alighted. There was no tie of causation between the plaintiff's injury and any negligence of defendant, no negligence of the defendant being shown. The defendant, or other carrier, should not be the least remiss in the choice of landing places, and cannot lawfully be. It must choose them with great care; and, where there is an embank-

ment or other surface fault which enhances the peril of alighting, the place is an improper one to discharge a passenger. But a careful study of the evidence in the present case discloses nothing tending to prove that the bank of dirt on which plaintiff stepped presented any perceivable difficulty or hazard. The facts before us are like those in *Conway v. Lewistown, etc., Ry. Co.*, 90 Me. 199, 38 Atl. 110, which was to recover damages for a broken ankle, the injury having been caused by stepping on a loose stone in getting off a street car. In that case, as in this one, the assignments of negligence against the defendant were running the car past the crossing and stopping it at an unsafe place; that plaintiff complained in her testimony of a slight ditch or depression in the ground where she got off, but the excavation was not dangerous, nor the step she had to take in leaving the car long or difficult. The opinion said, assuming her description of the place to be accurate, that there was a failure to establish liability on the part of the defendant, since neglect to stop the car precisely at the crossing was not culpable, nor was the place of alighting so difficult and unsuitable as to render it actionable negligence to permit a vigorous young woman to get off there. Further, that her injury was not the probable or ordinary result of stopping at that particular point, but was due to an event which could not have been anticipated."

13. **INJURY TO PASSENGER ALIGHTING FROM CAR; CONTRIBUTORY NEGLIGENCE.**—In the case of *Brazie v. St. Louis Transit Co.* (Mo. App.), 76 S. W. 708, it appeared that the plaintiff was a passenger on one of the defendant's street cars, and having signaled the servants of the defendant in charge of the car to stop at a certain place, and the car having stopped in response to such signal, she proceeded with reasonable expedition to alight; while in the act of alighting, and with her left foot on the lower step and her right foot in the air, the signal for starting the car was given and the car suddenly started; to prevent being thrown prostrate on the ground the plaintiff threw herself backward in an effort to remain on the car, but missed the car and struck her back against the rear end of the vestibule and dropped to the street, lighting on her feet, and by great effort avoided a fall. It was held that the passenger in attempting to save herself from injury was not guilty of contributory negligence.
14. **INJURY TO PASSENGER ALIGHTING; TIME TO BE ALLOWED FOR ALIGHTING;⁵ VARIANCE BETWEEN PLEADING AND PROOF.**—In the case of *Hannon v. St. Louis Transit Co.* (Mo. App.), 77 S. W. 158, it appeared that the plaintiff was a passenger on one of the defendant's cars and had with her a young child. The car was an open or summer car with seats at right angles to the length of the car, and with running-boards along each side. The plaintiff gave the usual signal to stop at a street crossing, in response to which the car stopped, and she stepped upon the running-

5. See note to *Champagne v. La Crosse City Ry. Co.*, *post*, p. 988.

board preparatory to taking off the child, when the car suddenly started and she was thrown to the street receiving the hurts complained of, the child remaining on the car. The defendant's testimony conflicted with that of the plaintiff, and tended to show that the car had remained stationary until after the plaintiff had alighted, when she tripped and fell. It was held that the plaintiff having a young child with her at the time of the accident should have been given extra time in which to alight, in view of the delay necessary to assist the child. The contention of the defendant that there was a variance between the complaint alleging that while the plaintiff was alighting from the car and before she had a reasonable time to alight the car started, and proof that it did not stop a sufficient time to allow her to alight in view of the delay caused in assisting the child was not sustained. The judgment in favor of the plaintiff was affirmed.

15. INJURY TO PASSENGER ALIGHTING FROM CAR BY SUDDEN STARTING OF CAR; THE QUESTION OF NEGLIGENCE OF PASSENGER ALIGHTING FROM MOVING CAR IS FOR THE JURY.—In the case of *Dawson v. St. Louis Transit Co.*, (Mo. App.), 76 S. W. 689, the plaintiff, desiring to alight from a car, touched an electric button for the purpose of notifying the defendant's motorman and conductor of his intention to get off; as the car approached the south side of the street its speed was lessened, as if in response to the plaintiff's signal, and became so slight as to be scarcely perceptible; the plaintiff undertook to alight when the car was suddenly started forward, whereby the plaintiff was thrown, dragged along the street, and received permanent injuries. It was held that the question of the contributory negligence of the plaintiff in attempting to alight from the car while in motion was for the jury. The court said: "If the court could not say, as a matter of law, that it was negligence *per se* for the plaintiff, considering his age, strength, activity, condition of health, and the surrounding conditions, to attempt to get off a car moving at a speed of about three miles per hour, then the demurrer to plaintiff's evidence was properly overruled." Citing *Fulks v. Railway Co.*, 111 Mo. 340, 19 S. W. 818; *Doss v. Railroad Co.*, 59 Mo. 27, 21 Am. Rep. 371; *Swigert v. Railroad Co.*, 75 Mo. 475; *Leslie v. Railroad Co.*, 88 Mo. 51; *Clotworthy v. Railroad Co.*, 80 Mo. 221; *Straus v. Railroad Co.*, 75 Mo. 185; *Weber v. Railroad Co.*, 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 7 L. R. A. 819, 18 Am. St. Rep. 541; *Filer v. Railroad Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *Bucher v. Railroad Co.*, 98 N. Y. 128; *Johnson v. Railroad Co.*, 70 Pa. St. 357. It was further held that in view of the plaintiff's evidence that he signified his intention to alight by touching the electric button, in response to which the car slowed down, for the purpose, as he supposed, to let him off, he had a right to assume that the car would continue to slow down until he got off, not that it would suddenly accelerate its speed before he had alighted. On such evidence it would be very harsh law to adjudge the plaintiff guilty of negligence *per se*, and deny him any relief.

16. **INJURY TO PASSENGERS ALIGHTING BY SUDDENLY STARTING CAR; CONTRIBUTORY NEGLIGENCE.**—In the case of *Scamell v. St. Louis Transit Co.* (Mo. App.), 76 S. W. 660, it appeared that the plaintiff was a passenger on one of the defendant's cars; that such car was an open car with running-boards on both sides without screens or bar on either side, and passengers were permitted to board and leave it on the side most convenient for them. As the plaintiff was about to step from the body of the car to the footboard the car suddenly started and threw him from the car upon the defendant's east track, where he was immediately struck and seriously hurt by a north-bound car, which was passing by at a rapid rate of speed. It was held that the sudden starting of the car from which the passenger was alighting was the proximate cause of his injury. The plaintiff's statement that when he alighted from the car he was looking at the place where he was about to step rather than for the approach of a car upon the other track did not show that he was guilty of contributory negligence. The court held in this case that the negligence of the defendant consisted in a breach of its positive duty not to start a car from which a passenger is alighting until such passenger has reached a place of safety. In the case of *Scamell v. St. Louis Transit Co.* (Mo. App.), 77 S. W. 1021, the mother of the plaintiff in the case immediately preceding, sued to recover damages for loss of her son's services. It was there held that where evidence conflicted as to whether a passenger left a street car voluntarily while it was in motion, or was thrown from it by the car's sudden starting, the question of the company's negligence and of the plaintiff's contributory negligence were for the jury.
17. **INJURY TO PASSENGER ATTEMPTING TO ALIGHT⁶ WHILE CAR WAS STILL IN MOTION BY SUDDEN ACCELERATION OF SPEED.**—In the case of *Duffy v. St. Louis Transit Co.* (Mo. App.), 78 S. W. 831, it appeared that the plaintiff, a passenger on one of the defendant's cars, gave a signal indicating his desire to alight from the car at the next street. The conductor gave the usual signal to the motorman, and in obedience thereto the motorman tried to stop the car, and slowed it down, but it did not come to a full stop on account of the failure of the brakes to work properly. When plaintiff reached the rear platform he discovered that the car had passed the stopping place from twenty-five to thirty yards, but was still slowed down to the speed of an ordinary walk, and he undertook to get off, but before he could alight from the car its speed was suddenly accelerated, whereby he was thrown off and injured. It was held that the contention that the plaintiff was bound to show that the defendant's servants knew of his position when the speed of the car was accelerated, is answered by the evidence that the plaintiff was a passenger, that he had given the usual signal of his wish to get off the car, and that the conductor, in recognition of that signal, had

6. See note to *Champagne v. La Crosse City Ry. Co.*, *post*, p. 988.

signaled the car to stop and saw the plaintiff leave his seat and go to the rear platform for the purpose of getting off. In these circumstances it was the duty of the conductor and motorman to hold the car still for a reasonable length of time to allow the plaintiff to get off in safety. The judgment for the plaintiff was affirmed.

18. INJURY TO PASSENGER IN BOARDING CAR; STATUS OF PASSENGER; CONTRIBUTORY NEGLIGENCE.— In the case of *O'Mara v. St. Louis Transit Co.* (Mo. App.), 76 S. W. 680, it appeared from the plaintiff's evidence that as a car approached the crossing where he was standing he signaled it to stop, and that in obedience to the signal the car stopped still and he got hold of the rear rail of the platform with his right hand and put one foot on the lower step, that thereupon the conductor rang the bell, the car gave a lurch throwing the plaintiff against the side of the car, and he lost his balance and fell to the street, causing the injury complained of. The defendant's witnesses testified that the car did not stop at the crossing and only slackened speed to the extent necessary to pass around a curve at the place. The motorman testified that he did not see the plaintiff's signal, and the conductor testified that he was on the inside of the car collecting fares and knew nothing of the plaintiff's presence until he saw him lying in the street after the car had stopped. The trial court instructed the jury that if the plaintiff signaled to the motorman his intention to become a passenger, and if the jury found that, in obedience to such signal, the car slowed down in order to let the plaintiff get on as a passenger, and while he was doing so, and before he had a reasonable opportunity to get safely on, defendant's servants caused the car to start forward with increased speed, by which the plaintiff was injured, and if the jury found the defendant's servants in charge of the car failed to exercise a high degree of care and skill, such as would be exercised by skillful railway employees, under similar circumstances, in causing and stopping the movements of the car, plaintiff was entitled to recover. In considering the question as to whether or not the plaintiff was entitled to protection as a passenger the court said: "The right of a person to carriage as a passenger on a street car rests on a contract, the essential ingredients of which are that the person must signify his intention to take passage, either by words or conduct, and the carmen must assent, by words or conduct, to his becoming a passenger. *Schepers v. Railway Co.*, 126 Mo. 665, 29 S. W. 712; *Farley v. Railroad Co.*, 108 Fed. 14, 47 C. C. A. 156; *Illinois Cent. Ry. Co. v. O'Keefe*, 168 Ill. 115, 48 N. E. 294, 39 L. R. A. 148, 61 Am. St. Rep. 68. It is not necessary to the status of passenger that a person be actually on a car, but he is entitled to the privileges of that status while attempting to get on, if the car has been stopped by those in charge for the purpose of receiving him or any one desiring to take passage. *Booth Railway Companies*, § 326; *Schepers v. Railway Co.*, *supra*; *Murphy v. Railroad Co.*, 43 Mo. App. 342; *Cleveland v. N. J. Steamboat Co.*, 68 N. Y. 306; *Smith v. Railroad Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550. Nor is it

absolutely essential that the car should be standing still when a person attempts to board it, in order for him to acquire the rights of a passenger. If carmen, instead of stopping their car, bring it to a slow movement at a crossing where passengers are received, in obedience to a signal from a bystander that he wishes to take passage, their conduct is an invitation to him to get aboard; and when he starts to do so he becomes a passenger, and entitled to be guarded from harm with high care. In view of the evidence to support it, we can find no fault in the instruction given by the court as to what facts the jury must believe the evidence established in order to find the plaintiff was a passenger, and entitled to the care which common carriers must take of passengers. Indeed, the defendant's instructions—both those given and the one refused—adopted the same theory as the plaintiff's in this respect. The defendant, as well as the plaintiff, presented instructions which made the question of whether plaintiff was a passenger, or not, turn on whether he gave a signal that he wanted to become one, which signal was observed by the motorman, and assented to by stopping or slowing the car to receive plaintiff; and we think that was an accurate way to declare the law on the facts of this case." It was contended that the plaintiff was guilty of contributory negligence as a matter of law in attempting to board the car while it was in motion. In this connection the court said: "The question of a party's contributory negligence in acting on an invitation, like the plaintiff says he had, to get on a going car, arises for consideration; and the circumstances may be such that a court would be justified in declaring he was guilty of contributory negligence as a matter of law. The movement of the car may be so rapid that it would be manifest negligence to endeavor to board it, or a person may be so infirm and incumbered by burdens as to make it negligence for him to attempt to board a car moving at a slow speed. *Traction Co. v. State*, 78 Md. 409, 28 Atl. 397. But the issue of alleged contributory negligence on the part of a person hurt while trying to get on a car in motion is mostly a jury issue; and it was declared in *Schepers v. Railroad Co.*, *supra*, that it cannot usually be said, as a matter of law, that a person making such an attempt is guilty of negligence, even if the car is moving at a speed of three or four miles an hour. Such an attempt is evidence of negligence which the jury must weigh. The question of plaintiff's contributory negligence stands entirely apart from the question of whether he was a passenger when he was hurt, and is to be ascertained from other facts. Whether he was a passenger depends, in the circumstances of this case, on a finding that he made known to the motorman his desire to become one, and the motorman's response to his signal, and acceptance of him as such, by stopping or slowing the car to receive him. The plaintiff's alleged contributory negligence depends on whether, all the circumstances considered, a man of ordinary prudence, of his years, would have attempted to get on the car, and was properly submitted to the jury in that light."

An instruction to the effect that if the jury found that the plaintiff was at a usual place for receiving passengers and signaled to the motorman, who saw his signal, and slowed the car for the plaintiff to get on, then it was the duty of the motorman to stop the car for a reasonable time so that the plaintiff might get safely on, was sustained, and in this connection the court said: "It was undoubtedly the duty of the defendant's servants, if they heard the plaintiff, to stop the car and hold it still until plaintiff got aboard; and whether it was actually at a standstill when he attempted to get on or was slowly moving, the duty to stop was none the less obligatory. Omitting to stop a street car a reasonable time to enable a person to get aboard, whose signal has been heeded by reducing speed to receive him, is surely a breach of duty; and there can be no harm in telling the jury so in an action for personal injuries alleged to be due to a breach of that obligation." The judgment in favor of the plaintiff was affirmed.

19. INJURY TO PASSENGER ATTEMPTING TO BOARD A CAR BY SUDDEN START; NEGLIGENCE IN ATTEMPTING TO BOARD A SLOWLY MOVING CAR; DUTY TO STOP AT CROSSING.—In the case of *Maguire v. St. Louis Transit Co.* (Mo. App.), 78 S. W. 838, it appeared that the plaintiff was standing at a street crossing and signaled the motorman of one of the defendant's cars to stop. The motorman turned off the power and twisted the brake, and when the rear end of the car came opposite to where the plaintiff was standing, it was moving very slowly. The plaintiff took hold of the handrail with the intention of getting aboard, when the car was suddenly started forward, and the plaintiff was jerked off his feet and dragged about twenty-five feet. He was then helped or pulled on the car by some one standing on the rear platform. The plaintiff pleaded a city ordinance requiring street cars to stop at crossings for the convenience of passengers. The defendant offered to prove that the company had a rule as to cars stopping for passengers when eight minutes late. The court excluded this evidence. It was held that such rule was not admissible. The court said: "The street railroad companies were not granted the use of the streets of the city solely for their own emolument and profit, but primarily for the carriage of passengers upon their cars. That they may make and enforce all needful rules and regulations in respect to the conduct of their business, including stops at street crossings, not inconsistent with the charter and ordinances of the city, is manifest; but they have no power to bind or affect the public by an unreasonable rule that is opposed to an ordinance of the city, as was the one offered in evidence and excluded by the court." In respect to an instruction as to the negligence of the plaintiff in attempting to board a car while it was slowly moving the court said: "If the car was moving very slowly, it was not negligence *per se* for the plaintiff to attempt to board it. Whether or not it was negligence was a question for the jury, and the instruction told the jury that, to authorize a verdict for the plaintiff, they should find that at the time he attempted

to board the car he was exercising ordinary care; hence the instruction is not open to the objection made." It was also contended by the defendant that the plaintiff made a mistake in supposing the car had slowed down for the purpose of receiving him as a passenger, and should bear the consequence of his own mistake. The court said: "If he did make a mistake, according to the evidence, the mistake was induced by the conduct of the motorman in turning off the power, twisting the brake, and slowing down the car at a time and place, and under circumstances that would induce any one in the plaintiff's place to believe, as the plaintiff believed—that is, that the motorman intended to stop the car to let him and the other eight or ten persons present and waiting for a car to get aboard; and the defendant, not the plaintiff, is responsible for the consequence of the mistake, if plaintiff himself was not guilty of contributory negligence in attempting to board the car while in motion." The rule is that the car must be stopped for a reasonable time; that is, time sufficient for a passenger to board the car. An instruction to the effect that it is negligence, after stopping the car to let on a passenger, to start it before he "had a reasonable time to get upon said car, and to a place of safety therein," is within this rule. A judgment for the plaintiff was affirmed.

20. INJURY TO PASSENGER CAUSED BY COLLISION OF STREET CAR; PRIMA FACIE EVIDENCE OF NEGLIGENCE.—In the case of *Robinson v. St. Louis & Suburban Ry. Co.* (Mo. App.), 77 S. W. 493, it appeared that the plaintiff, a passenger on one of the defendant's cars, was injured by a collision of such car with another car approaching from the opposite direction on the same track. It was held that the collision of cars running in opposite directions on the same track was *prima facie* evidence of the defendant's negligence. When this appears the burden is upon the defendant to show by a preponderance of the evidence that the collision was not due to its fault. An instruction that the defendant was liable if the plaintiff was injured in consequence of a head-end collision of its cars, if the defendant's servants in charge of the car could have prevented such collision by the exercise of that high degree of care which would have been exercised by careful, skillful railroad employees under similar circumstances, was a correct statement of the law. A judgment in favor of the plaintiff was affirmed.
21. INJURY TO PASSENGER BY DERAILMENT OF CAR; NEGLIGENCE OF COMPANY IN FAILING TO LOCK SWITCH; PRIMA FACIE NEGLIGENCE OF COMPANY.—In the case of *Heyde v. St. Louis Transit Co.* (Mo. App.), 77 S. W. 127, the plaintiff, a passenger on one of the defendant's cars, was injured by the car on which he was riding colliding with another car upon a switch, owing to the defective condition of such switch. It appeared from the evidence that cars had frequently jumped the track at the point where the accident occurred. The motorman in charge of the car in question testified that the car was not apt to leave the track if everything was in good condition, and the master mechanic of the defendant

company testified that accidents of this kind might be prevented by putting a key or wedge in the switch and locking it; that it would take from half a minute to a minute to lock it. In view of this evidence it was held that no conclusion could be drawn, that the accident was unavoidable by the exercise of proper care. The question of the defendant's negligence, therefore, fell to the jury for decision. The collision made a *prima facie* case for the plaintiff, and the evidence in the case fell short of overcoming the presumption of negligence. An instruction to the effect that if the jury found the agents, servants, and employees of the defendant in control of the car on which the plaintiff was a passenger, or of the track on which such car was running, or the switch at the place where the derailment occurred, could have prevented said derailment and collision by the exercise of the very high degree of care and foresight of skillful, careful, and practical railroad operators under the same or similar circumstances, then the plaintiff was entitled to recover, was sustained as a proper declaration of the law applicable to such cases.

22. INJURY TO PASSENGER CAUSED BY DEFECTIVE GATE ON PLATFORM; PRESUMPTION OF NEGLIGENCE; OPINION EVIDENCE AS TO SPEED OF CAR.—In the case of *Aston v. St. Louis Transit Co.* (Mo. App.), 79 S. W. 999, it appeared that the plaintiff, accompanied by her husband and children, boarded a car of the defendant which was so filled with passengers that they were compelled to remain on the rear platform. The plaintiff and her daughter of about seven years of age stood near or against the gate on the north side of the platform. After proceeding a short distance the gate swung open and the mother and daughter were precipitated from the car to the ground and injured. The testimony on behalf of the plaintiff tended to show that the gate was not fastened, but the cause of its coming loose did not clearly appear. It further appeared that the car was being propelled at a high rate of speed, and that the roadbed at the place where the accident occurred was in bad condition. It appeared from the evidence of the defendant that the roadbed was in good condition and properly constructed; that the gate was fastened; that it had been inspected on the same day and found to be in perfect condition; that the speed of the car was moderate, not exceeding ten miles an hour. It was held that the plaintiff by showing the happening of the accident made out a *prima facie* case, and the burden shifted to the defendant to absolve itself from presumptive and inferred negligence; and it was for the jury to say in the light of all the testimony, whether the defendant had, in its defense, disclosed facts exonerating it from responsibility. It was contended in this case that the court erred in admitting opinions of witnesses as to the rate of speed attained by the defendant's car, since such witnesses were not shown to have been especially qualified to testify as to such speed.⁷ It was held that

7. As to opinion evidence see note to *Omaha St. Ry. Co. v. Larson*, *post*, p. 654.

no technical knowledge is essential to form an opinion as to the speed of an electric car; where witnesses are shown to have frequently ridden on street cars they are qualified to express their judgment upon the rapidity at which a car was operated, leaving the jury to give such testimony its merited weight. A judgment for the plaintiff was affirmed.

23. ASSAULT OF PASSENGER BY CONDUCTOR;⁸ INSTRUCTION OF JURY.—In the case of *Sonnem v. St. Louis Transit Co.* (Mo. App.), 76 S. W. 691, it appeared that the plaintiff, a passenger on one of the defendant's cars, was standing near the doorway of the rear platform in such a way as to block the exit of passengers from the car. He was told by the conductor to move to one side, and, according to his evidence, was forcibly struck by the conductor upon the back. The plaintiff protested, and the conductor struck him forcibly upon the side of the head, knocking him into the street. The defendant's evidence tended to show that the plaintiff struck at the conductor and that the conductor then struck the plaintiff. The defendant's contention that an instruction to the effect that if the conductor assaulted the plaintiff without cause the company was liable, was erroneous as ignoring the conductor's right of self-defense, was not sustained, where it appeared that other instructions were given fully defining that right. An instruction in regard to the assessment of exemplary damages against the defendant was held not subject to review on the complaint of the defendant where exemplary damages were not awarded by the jury. A judgment in favor of the plaintiff was affirmed.

24. EJECTION OF PASSENGER FOR FAILURE TO PAY FARE; INSTRUCTION.—In the case of *Gotwald v. St. Louis Transit Co.* (Mo. App.), 77 S. W. 125, the plaintiff alleged in his complaint that he had refused to pay his fare after boarding a car until the car had passed a dangerous curve, he, at the time the fare was demanded, having hold of a rail to keep him from being thrown from the car, and being incumbered with packages, but that the conductor threw him from the moving car with unnecessary force, which allegations were sustained by the plaintiff's testimony. The answer of the defendant alleged that on the plaintiff's refusal to pay his fare the conductor had put him off without unnecessary force, which theory was sustained by the conductor's testimony. The court instructed that if the jury found that the plaintiff refused to pay his fare the conductor had a right to put him off, but had no right to use any more force than necessary, nor to subject him to injury by pushing him off while the car was moving; and, if the conductor violently pushed him from the car when it was moving so rapidly as to throw him to the ground and injure him, the plaintiff was entitled to recover. It was held that the instruction was not open to the objection that it permitted a recovery on a different cause of action from that stated in the complaint. The judgment in this case in favor of the plaintiff was

8. See note to *Birmingham Ry. L. & P. Co. v. Mullen*, *ante*, p. 5.

reversed, however, because of the introduction of evidence relating to a statement made by the conductor shortly after the ejection of the passenger, and when passengers were crying "Stop the car," to the effect that he was not going to stop the line for a man; such evidence was held inadmissible since it did not constitute a part of the *res gestæ*.

25. FELLOW SERVANTS' STATUTE; STREET RAILWAY NOT WITHIN ITS PROVISIONS.⁹

— In the case of *Johnson v. Metropolitan St. Ry. Co.* (Mo. App.), 78 S. W. 215, the plaintiff was an employee of the defendant and was injured by the negligent act of another of the company's servants. It was conceded that the employee injured and the employee whose negligence caused the injury were fellow servants. The contention that notwithstanding this fact the defendant was liable because of the provisions of the so-called "Fellow Servants' Statute," whereby the master of common servants is answerable for their negligence to each other, cannot be sustained because such statute only applies to railroads as that word is commonly understood and has no application to a street railway. It follows, therefore, that under such statute the servants of a street railway company cannot hold the master for an injury inflicted through the negligence of fellow servants. Citing *Sams v. Railway Co.*, 174 Mo. 53, 73 S. W. 686, 61 L. R. A. 475. A judgment for the plaintiff was reversed.

26. CONDUCTOR OF ONE STREET CAR AND MOTORMAN OF ANOTHER ARE FELLOW SERVANTS.—

In the case of *Stocks v. St. Louis Transit Co.* (Mo. App.), 79 S. W. 476, it appeared that the plaintiff was hurt while he was employed by the defendant as conductor on one of its trolley cars. He alleged in his petition and his evidence tended to prove that the injury received was caused by the negligence of a motorman operating another trolley car, and not by any negligence of the defendant company in the discharge of duties which could not be delegated to its employees. The injury received was occasioned in the following manner. The trolley car on which the plaintiff was conductor became disabled and was started to the car sheds to be repaired. The car had proceeded westwardly on the street to a point opposite the company's power-house, and just west of the west end of a track connecting the north and south tracks, called a "crossover," used to switch cars from one track to the other. Plaintiff's car was on the north track, as it was proceeding westward. After it had reached the west end of the crossover, plaintiff changed his trolley pole from the east to the west end of the car, so as to run over the connecting track into the power-house or shed. Having adjusted the trolley pole, he tried to open a gate on the south side of the west vestibule of his car in order to get on the platform, and while so doing the motorman of the other car carelessly ran the car against him, inflicting the injury complained of. The only question was as to whether or not the conductor and motorman were fellow servants. In reliance upon

⁹ See *Indianapolis & Greenfield R. T. Co. v. Foreman*, and note thereto, ante, p. 206.

the principle declared in the case of *Relyea v. Railroad Co.*, 112 Mo. 86, 20 S. W. 480, 18 L. R. A. 817, to the effect that employees are coservants only when their duties are so related and associated as to enable them to observe and have an influence over each other's conduct, and report delinquencies to a common correcting power; that employees engaged in different departments are not fellow servants, it was held that the plaintiff and the motorman of the car causing the injuries were fellow servants. It was also held in this case that the fellow servant statute (Rev. Stat. 1899, § 2873), providing that a railway corporation shall be liable for all damages sustained by an agent or servant thereof while engaged in the operation of the railway, by reason of the negligence of any other agent or servant, does not apply to street railway companies; as to such companies the rule of the common law is applicable that the master is not responsible for an injury to a fellow servant due to the negligence of a coservant.

City of Lincoln v. Lincoln Street Railway Co.

(Nebraska — Supreme Court.)

REDEMPTION FROM LIEN FOR PAVING ASSESSMENTS AGAINST STREET RAILWAY.¹—Where a lien for paving assessments has been ascertained and fixed in favor of a city against a street railway by a decree of court, and such railway is sold under foreclosure of a mortgage executed subsequent to such lien, the purchaser of the property at such sale may redeem from the lien for the paving assessments, and upon such redemption he will be subrogated to the rights of the city in respect to such lien, and will hold the property as against a lien subsequent to that of the mortgage, notwithstanding the fact that the city is the holder of such subsequent lien.

APPEAL by plaintiff from judgment for defendant. Decided October 21, 1903.
Reported (Nebr.) 97 N. W. 255.

E. C. Strode and *D. J. Flaherty*, for appellant.

Clark & Allen and *J. W. Deweese*, for appellees.

Opinion by GLANVILLE, C.

This is an appeal from an order of the District Court of Lancaster county subrogating the Lincoln Traction Company to a

1. As to tax lien upon street railroads, see *Mersick v. Hartford*, etc., H. R. Co., 1 St. Ry. Rep. 37, (Conn.) 55 Atl. 664. As to enforcement of obligation of street railway company to pave between tracks see *Farson v. Fogg*, 2

first lien on the property in question, established by the former decree of the court in favor of the city of Lincoln. The parties will be herein designated as the "City," the "Security Company," the "Guaranty Company," the "Traction Company," and the "Street Railway Company" after their first mention.

The order was made upon a motion filed by the appellee after the decree of that court establishing the liens and their priority had been affirmed in this court. By that decree the city of Lincoln was awarded a first lien upon the property in question for \$48,180.25. The court also found that the mortgage of the New York Security & Trust Company constituted a valid second lien on the property in the sum of \$904,000, subject only to the first lien of the city of Lincoln; that the city had a third lien on the property in the sum of \$10,792.13; that the New York Guaranty & Indemnity Company had a fourth lien on the property for \$1,162,889; that the mortgages of the security company and the guaranty company had been foreclosed in the United States Circuit Court, and that the Lincoln Traction Company purchased the property in question at the foreclosure sale, and received a deed therefor, and thereby acquired the title and ownership thereof. The plaintiff's lien was limited to the real estate formerly owned by the Lincoln Street Railway Company, but the lien of the security company covered all the property, both real and personal. The judgment of the court based upon its finding is as follows:

"It is therefore considered, ordered, and adjudged by the court that, in case the defendant Lincoln Street Railway Company fail for twenty days from the entry of this decree to pay the plaintiff the sums found due and costs of this action, taxed at \$452.86, that the defendant's equity of redemption be foreclosed, and said premises shall be sold, and an order of sale shall issue to the sheriff of Lancaster county commanding him to sell the said property as upon execution, and bring the proceeds into court, to be applied in satisfaction of the sums so found due in the order of their priority as above found upon confirmation of the sale."

St. Ry. Rep. 87, (Ill.) 68 N. E. 755. As to the priority of a lien of a city for the cost of keeping in repair the street between the rails and on each side of the rails of a street railway company, see *Pensacola v. Northup*, 66 Fed. 689, 14 C. C. A. 59; *Toledo, etc., R. Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. Ed. 905; *City of Chicago v. Sheldon*, 9 Wall. 50, 19 L. Ed. 594.

The decree was entered on the 12th day of March, 1902. The order complained of herein was entered on the 25th day of June, 1903, and is as follows:

"This cause now comes on to be heard upon the motion of the defendant, Lincoln Traction Company, for an order directing the plaintiff, the city of Lincoln, to assign to the Lincoln Traction Company the first lien set forth in the decree of the court heretofore entered herein, and is submitted to the court, on due consideration whereof the court finds that the said defendant has paid into court the amount of said first lien due the plaintiff, with interest and costs. It is, therefore, by the court ordered that said motion be, and the same hereby is, sustained, and the said plaintiff, the city of Lincoln, is hereby ordered to assign to the defendant, The Lincoln Traction Company, all of its right, title, and interest in and to the said first lien upon the property in controversy in this action, as set forth in the decree of the court entered herein on the 12th day of March, 1902, and upon failure of the plaintiff to assign said first lien as above ordered it is by the court further ordered that this order operate as a full and complete assignment thereof."

The bill of exceptions filed in this case is the same bill filed herein on the appeal from this decree, and was settled on the 23d day of May, 1902. Whether or not any of the evidence therein contained was considered by the court in making the ruling now appealed from does not appear, and we are of the opinion that the determination of this appeal is governed by the rights of the parties as they were established by the former decree, and that it sufficiently appears from the record before us that no evidence was taken or considered by the court in this ruling outside of the decree itself. Under the repeated holdings of this court we think a junior lienholder is ordinarily entitled to redeem a senior incumbrance, and to an assignment of the security. *Anderson v. Commission Co.*, 58 Nebr. 670, 79 N. W. 613; *Renard v. Brown*, 7 Nebr. 449; *Miller v. Finn*, 1 Nebr. 254. Considering the rights of parties as they are established by the decree in this case, is the appellee, the traction company, a junior lienholder? As thus fixed, the city has a first lien upon the property in question; the traction company has title to the real estate, subject to the first lien of the city, and other property not so subject; the city has a third lien upon the real estate. If was found that the mortgages of the security company and guaranty company were second and fourth liens on all the property, and

that the second and fourth liens had been foreclosed, and the entire property sold to the traction company. No finding is made as to why the plaintiff's liens were not established or foreclosed in the first action, and we do not consider ourselves at liberty to examine the pleadings and evidence leading up to the decree in this case to determine for ourselves what should have been, or what might have been, the finding of the court in that regard, believing, as we have said, that the appellee's motion only entitled it to such rights and equities as legally and necessarily follow from the previous judgment and finding of the court and the situation of the parties thereby established. If any parties desire to establish any further rights than those which necessarily follow from the previous adjudication, because of any change of relationship to the property and the various liens established thereon, they can do so only by filing supplemental pleadings, and, if issues are joined thereon, then establishing their rights by a trial. Does the decree, then, place the appellee in the position of the holder of a lien junior to the first lien of the city, so that *ipso facto* it has the right to subrogation as awarded it by the order appealed from? It is held almost without exception that a purchaser at a judicial sale of real estate will be subrogated to the rights of the lienholder by virtue of whose lien the sale is sought to be made, whenever the sale is rendered void as against subsequent lienholders over whose liens the court had no jurisdiction, and who, therefore, have a right to redeem notwithstanding the attempted judicial sale; and as we must conclude that the city's right to these liens was for some reason not cut out by the foreclosure, we are justified in holding that, as against the city as the holder of the first lien, the purchaser is entitled to be subrogated to the second lien of the security company. The security company, prior to the foreclosure of its mortgage, could have redeemed from the prior lien held by the city for paving assessments. Had it done so, it could have included the amount so paid with its lien set up and foreclosed in the United States court; and in that case a purchaser at the judicial sale, as against any junior incumbrancers who were not concluded by the decree in that action, would have held the right of subrogation to the entire debt due to the security company, including the paving assessments so paid. Under our

appraisement law the assessments found to constitute a first lien may have been deducted from the appraised value of the real estate before sale, or the plaintiff in that action may have waived such deduction. In either case the title of the purchaser is in fact subject to the lien of these assessments. The title of the appellee being subject to such lien, it could not thereafter acquire any rights against the street railway company by subsequently paying the assessments; but as against the holder of the junior lien, whose right in the property has always been subject to both prior liens, the rule may be different. The appellant's property has not been acquired by the purchaser by any less bid at the sale to its injury as the holder of the third lien because of such first lien, for it always was a prior incumbrance. Suppose, as appellant claims, the purchase price of the property at the sale be conceded to be the amount of money bid, added to the prior lien subject to which the property was sold; so estimated, the purchase price left no more and no less to be applied upon the third lien; but what equitable right has it as third lien, or to require it to be paid and extinguished by the purchaser, and its third lien be thereby advanced to the extent of \$48,000? The interest of the traction company in the subject of litigation was acquired by its purchase at the foreclosure sale.

Section 853 of our Code provides that a deed made, upon a sale under foreclosure of mortgages, "shall be as valid as if executed by the mortgagor and mortgagee, and shall be an entire bar against each of them, and all parties to the suit in which the decree for such sale was made, and against their heirs respectively, and all persons claiming under such heirs." The deed, then, under which the traction company claims, would carry to it the estate of the street railway company (which is usually termed the "equity of redemption," but which is in fact the legal title), together with the interest of the security company in the premises, which is its interest as mortgagee, and there would be a merger of the lesser estate in the fee, and the lien be extinguished, unless for some reason a court of equity will hold that such merger did not take place. One of the conclusions of law expressed by the District Court is: "The court finds that the mortgage of the New York Security & Trust Company is a valid lien upon the property de-

scribed therein, subject only to the plaintiff's lien mentioned in the first conclusion of law." We think this conclusion is decisive that no merger was effected in this instance, and that the two estates are held separate and distinct by the traction company. Indeed, without this finding we think the conclusion follows the other findings of the court that the lien would be kept alive in equity. In *Miller v. Finn*, 1 Nebr. 254, the syllabus is in part as follows: "There can be no merger unless a greater and a less estate meet in the same person holding in the same right. Nor where intervening rights or estates interfere nor where the interests of the party in whom the estates meet so require. Nor where the intention to keep the estates distinct may be inferred or has been expressed." In the course of the opinion it was said by Judge Mason:

"The doctrine of merger has been discussed by the courts from an early period down to the present time; and, if any principle of law seems to be well settled, it may now be said that in all cases when intervening rights interfere, or when the two estates meet, and it is necessary that the charge be kept on foot to protect those interests, the courts will not enforce a merger. In Co. Litt. 388, it is said: 'Mergers were not favored in courts of law, and still less in courts of equity.' They are never allowed unless for special reasons, and then only to preserve the intention of the parties. *Philips v. Philips*, 1 P. Wms. 41. When there is a union of rights, equity will preserve them distinct if the intention so to do is either express or implied. The distinction stated by Lord Hardwicke is that, when the owner of the fee in which the charge would otherwise merge manifests his intent that the charge shall subsist, his intent, if clear, shall prevail. *Chester v. Willis*, Amber 246. In *Compton v. Oxender*, 2 Ves. Jr. 264, Lord Thurlow observed: 'It is a clear principle, both at law and in equity, that, where there is no confusion of rights, when debtor and creditor become the same person, there is an immediate merger, but that equity will preserve the rights distinct, according to the intent, express or implied.' Whenever it is more beneficial for the person entitled to the charge to let the estate stand with the incumbrance upon it than to take it discharged of the incumbrance, that circumstance will have a controlling influence in deciding on the implied intent. *Wade v. Paget*, 1 Brown Ch. 368. In *Forbes v. Moffat*, 18 Ves. 364, Sir William Grant says: 'It is very clear that a person becoming entitled to an estate subject to charge for his own benefit may, if he choose, at once take the estate and keep the charge. Upon this subject a court of equity is not controlled by the rules of law. It will sometimes hold a charge extinguished when it would subsist at law, and sometimes preserve it when at law it would be merged.'"

And the following language from *Bank of United States v. Peters*, 13 Pet. 125, 10 L. Ed. 89, is quoted with approval:

"It is a well-settled principle in equity that a judgment creditor who is compelled to pay off a prior incumbrance on land to obtain the benefit of his judgment may, by assignment, secure to himself the right of the incumbrance; and the same rule applies when a junior mortgagee, to save his lien, is obliged to satisfy a prior mortgage on the same estate. He stands as the assignee of such mortgagee, and may claim all the benefits under the lien that could have been claimed under the assignor."

That case was where a judgment lienholder whose lien was junior to that of a mortgage sought to redeem the premises, claiming that by such redemption they would be entitled to the premises themselves. The mortgage had been foreclosed by sale made after the mortgagee had become the owner of the equity of redemption, but plaintiff was not bound thereby. It was held that the lien of the foreclosed mortgages did not merge in the title which had passed to the mortgagee, and that the plaintiff was, in law, entitled to redeem from the lien of the foreclosed mortgage, unless the holder of the title saw fit to pay him the amount of his judgment, the redemption to be "upon the usual terms of decrees for redemption of mortgages." Most of the cases cited by appellant wherein subrogation was refused are where purchasers who have bought subject to senior liens have sought the right for the purpose of enforcing payment of those liens from the original debtor whose property had virtually once been applied to their payment, and such cases have no application to the one before us. Appellee is not seeking the right of subrogation for the purpose of compelling payment from the street railway company, but out of the property that is the primary fund for payment. Indeed, such taxes as form the basis of the first lien do not represent an enforceable personal liability, but can be enforced only by sale of the property, and the street railway company has no interest in the matter because the amount of the deficiency upon the mortgage bonds for which it may be liable has become fixed by the proceedings in the United States court. The case of *Shirk v. Whitten* (Ind. Sup.), 31 N. E. 87, is not in point, for there the improvements for which the assessment was levied became betterments to the property after the purchase. The only case claimed by the appellant upon the argu-

ment to be directly in point is *Tillman v. Stewart*, 30 S. E. 950, 69 Am. St. Rep. 192, a Georgia case. We do not think the case at all controlling. There the alleged intervening liens of those seeking an enforced assignment of the senior lien were in dispute, and it was said by the court:

"Certainly a court of equity should hesitate to put in motion its extraordinary power to compel a prior mortgagee to transfer his lawful and undisputed mortgage to second mortgagees, when it is at least a matter of doubt whether the latter have any rights in the premises. They appear in court confessedly as holders of second mortgages that have been attacked as fraudulent, and themselves show that so much reason for the attack existed as to justify a court of competent jurisdiction in restraining them from enforcing their claims until the *bona fides* could be more closely scrutinized."

Neither does any of the reasoning of the court therein convince us that in the present case the right ought to be denied.

In this appeal some complaint is also made of an order of the District Court setting aside a certain appraisement of the property involved, but we do not think appellant is seriously contending that the order complained of is a final order, or that the order was not in fact right as the record stands. Where real property is to be sold under a decree containing an order for the distribution of the proceeds of a sale of the entire property, liens ordered paid out of the proceeds may not be deducted from the appraised value of the property as prior liens. We are of the opinion that by virtue of the rights of the parties as they were ascertained and determined by the decree appellee had a right to redeem, and, upon proper motion, to be subrogated to the first lien.

We recommend that the order appealed from be affirmed.

BARNES, C., concurs.

ALBERT, C. I concur in the conclusion.

PER CURIAM. The conclusions reached by the commissioners are approved, and, it appearing that the adoption of the recommendations made will result in a right decision of the cause, it is ordered that the judgment of the District Court be affirmed.

Lincoln Traction Co. v. Moore.

(Nebraska — Supreme Court.)

1. **QUESTIONS FOR REVIEW.**—Questions not presented to the trial court by the motion for a new trial, and which are not mentioned in the petition in error, cannot be considered by this court.
2. **HORSES FRIGHTENED BY CAR;¹ EVIDENCE.**—In an action for personal injuries due to the frightening of plaintiff's team by the alleged negligent operation of a street car in running the same carelessly and negligently at a high rate of speed, and where it appeared from the testimony of all of the witnesses that the car was going slowly, that the motorman slowed it down and stopped it as soon as he saw that the team was becoming frightened, no inference of negligence arises, and a judgment for plaintiff will be reversed for want of evidence to sustain it.

(Syllabus by the court.)

ERROR by defendant from judgment for plaintiff. Decided December 2, 1903.
Reported (Nebr.) 97 N. W. 606.

Clark & Allen, for plaintiff in error.

Billingsley & Greene, for defendant in error.

Opinion by BARNES, C.

The Lincoln Traction Company, the plaintiff herein, owned and operated a street railway on the highway running east and

1. HORSES FRIGHTENED BY NEGLIGENT OPERATION OF STREET CAR.

1. General rule.
2. Fright caused by sound of gong.
 - a. When sounding gong is not negligence.
 - b. Duty where fright of horse is observed.
3. Fright caused by approaching car.
 - a. When failure to stop or lessen speed is not negligence.
 - b. Failure to stop when fright of horse is observed.
4. Negligence in driving fractious horse near street car.
5. Fright of horse caused by unusual noises in connection with street car, or by unusual appearance thereof.
6. Rule in respect to fright of horses caused by operation of steam railroads.

1. General rule.—A street car company is not liable for accidents arising from fright of horses caused by the usual operation of its road, if its employees are free from negligence, and this must be determined from the facts

west on the north side of Lincoln park, adjacent to the city of Lincoln, on the 29th day of April, 1899. On the afternoon of that day Jesse D. Moore, the defendant herein, was driving a double team hitched to a light road wagon going east over that road. The traction company's street car rounded the curve, on its way west, when the team was about 400 feet away. From the

and circumstances in each case. *Nellis Street Railroad Accident Law*, p. 284. The mere fact that a horse becomes frightened at an electric car and the sounding of its gong and runs away does not make the company liable. There must be some misconduct on the part of the company's employee having control of the car. *Galesburgh Elec. Motor & Power Co. v. Manville*, 61 Ill. App. 490; *North Chicago St. R. Co. v. Harms*, 59 Ill. App. 374; *Kankakee Elec. Ry. Co. v. Lade*, 56 Ill. App. 454; *Steiner v. Philadelphia Traction Co.*, 134 Pa. St. 199, 19 Atl. 491; *Bishop v. Bell City St. Ry. Co.*, 92 Wis. 139, 65 N. W. 733; *McDonald v. Toledo Cons. St. Ry. Co.*, 74 Fed. 104, 20 C. C. A. 322 (holding that it is not negligence, in itself, to start an electric street car in the ordinary manner, and in the ordinary course of the operation of such car, while a team of horses, which manifest no symptoms of fright, are being driven past it).

Where it is sought to recover against a street railway company for injuries resulting from the fright of a horse caused by a street car it must be established to the satisfaction of the jury that in the light of all the circumstances the person in charge of the car had not acted as a person of ordinary prudence would have acted in the same circumstances, since the right to recover rests on the establishment of the defendant's negligence. *Klatt v. Houston Elec. St. Ry. Co.* (Tex. Civ. App.), 57 S. W. 1112. As where it was claimed that a horse was frightened by being struck by a piece of snow or ice thrown from a street railway track by the brooms of an electric sweeper a recovery of damages could not be had in the absence of positive proof that the snow or ice came from the sweeper, and in the absence of evidence that the sweeper was defective or was negligently operated. *Connor v. Metropolitan St. Ry. Co.*, 48 App. Div. (N. Y.) 580, 63 N. Y. Supp. 509.

2. Fright caused by sound of gong. a. **When sounding gong is not negligence.**—A motorman, in the proper performance of his duties, is required to sound the gong upon his car at intervals and at certain places and under certain circumstances so as to sufficiently warn travelers on or near the tracks of the approach of his car. If a horse driven along the street is frightened by the sounding of a gong in the ordinary operation of a street car, the company cannot be held accountable for the injuries thereby occasioned, unless the motorman observed, or should have observed, that the horse was frightened so as to be unmanageable or was likely to become so by a continuance of the noise produced by the gong. *Henderson v. Greenfield & T. F. St. Ry. Co.*, 172 Mass. 542, 52 N. E. 1080; *Mineral St. Ry. Co. v. Maynard*, 5 Ind. App. 372, 32 N. E. 343. In the case of *Northside St. Ry. Co.*

evidence it appears that the car was going slowly, and when the motorman saw the team was becoming frightened he turned the electric current off and slowed up still more. Some of the witnesses say he stopped the car, and some of them testified that the car was either stopped, or was creeping along very slowly toward

v. Tippins, 3 Am. Electl. Cas. 489, (Tex. Civ. App.) 14 S. W. 1067, it appeared that the plaintiff's team of horses was hitched to a post upon the side of a street, and the defendant's street car in passing along the street frightened the horses, and they broke away from the post and ran away, causing the injury complained of. It was held that the plaintiff could not recover unless he showed that the injury resulted from the negligence of the defendant's employees in operating the car; that the mere sounding of a gong while the car was moving along the track for the purpose of warning persons of the approach of the car, and to prevent accidents on the track, was not negligence, in the absence of proof that the gong was sounded unnecessarily or negligently; and in the case of *Chapman v. Zanesville St. Ry. Co.*, 27 Ohio L. J. 70, it was held that if a horse becomes frightened at an approaching car and, because the sounding of the gong or the ringing of a bell is not discontinued, becomes unmanageable and runs away, injuring the driver and others, the company is not liable unless the conduct complained of in the management of the car is attributable only to wanton or malicious disregard for the safety of the driver or other travelers upon the street. See also *Cornell v. Detroit City Elec. Ry. Co.*, 3 Am. Electl. Cas. 486, 82 Mich. 495, 46 N. W. 791; *Coughty v. Willamette St. Ry. Co.*, 21 Oreg. 245, 27 Pac. 1031; *Steiner v. Philadelphia Tract. Co.*, 134 Pa. St. 199, 19 Atl. 491.

b. Duty where fright of horse is observed.—But where a motorman sees that horses are frightened by the approach of his car and the sound of the gong, and are rapidly becoming unmanageable, so that the driver or the persons with him are in imminent peril, it becomes the duty of the motorman to cease sounding his gong, and if he fails so to do he is guilty of negligence for which the company is liable. *Wachtel v. East St. Louis St. L. Elec. R. Co.*, 77 Ill. App. 465; *Kankakee Elec. R. Co. v. Lade*, 56 Ill. App. 454; *Citizens' Ry. Co. v. Hair* (Tex. Civ. App.), 32 S. W. 1050.

A street railway company may be charged with negligence in sounding a gong upon a car approaching an obviously frightened team. *Benjamin v. Holyoke St. Ry. Co.*, 160 Mass. 3, 35 N. E. 95. Where a horse standing near a street car track is alarmed by a car, the ringing of the car gong violently so as to produce greater alarm may constitute negligence. *Philadelphia Trac-tion Co. v. Lightcap*, 61 Fed. 762, 10 C. C. A. 46. It may be stated, therefore, that the continuous sounding of a bell or gong upon a street car approaching a team, when the person operating the car sees, or by the exercise of ordinary diligence could have seen, that the team has become unmanageable, is negligence, rendering the company liable. See *Ellis v. Lynn & B. R. Co.*, 160 Mass. 341, 35 N. E. 127. Reasonable means to prevent scaring horses, and thereby

the team. The horses were traveling in a walk, and when they got nearly to the car they suddenly jumped to one side into the ditch. In attempting to hold them and control their movements, Moore placed his foot against the dashboard of the wagon to brace himself; the pressure broke it off, causing him to slide partly out

injuring persons riding or driving along the street must be taken when a street railway car is propelled in such a condition that a reasonably prudent man would apprehend that it would frighten horses. *McCann v. Consolidated Tract. Co.*, 59 N. J. L. 481, 36 Atl. 388, 38 L. R. A. 236. In the case of *Owensboro City Ry. Co. v. Lyddane*, 19 Ky. Law Rep. 698, 41 S. W. 578, it was held that a motorman of an electric car is guilty of negligence rendering the company liable, where, after observing that a horse attached to a buggy is frightened at the ringing of the gong, he does not cease ringing the gong as a result of which the horse runs away, injuring the driver.

3. Fright caused by approaching car. a. **When failure to stop or lessen speed is not negligence.**—The failure to stop or lessen the speed of a car upon observing that a horse approaching from the opposite direction is frightened is not negligence unless the circumstances indicate that the horse will become unmanageable if the car approaches and that the driver or persons with him are in imminent peril. *East St. Louis, etc., Elec. R. Co. v. Wachtel*, 63 Ill. App. 181; *Terre Haute Elec. R. Co. v. Yant*, 21 Ind. App. 486, 51 N. E. 732; *Doster v. Charlotte St. Ry. Co.*, 107 N. C. 651, 23 S. E. 449, 34 L. R. A. 481; *Steiner v. Philadelphia Traction Co.*, 134 Pa. St. 199. Thus, in the case of *Eastwood v. La Crosse City Ry. Co.*, 94 Wis. 163, 68 N. W. 651, it was held that the motorman of an electric car was not bound to slacken the speed and stop his car at the moment a horse upon the street within his range of vision begins to show signs of uneasiness; an inference of negligence is not justified from the motorman's failure to stop the car upon seeing that a gentle team about 175 feet in advance, driven by a full-grown man, was beginning to prance, where it appeared that the team was in a well-traveled road at the side of the track, nearly sixteen feet in width, and was in perfect safety, and did not appear to be beyond the driver's control. Nor can a street railway company be chargeable with negligence for the motorman's failure to stop or slacken the speed of his car upon seeing that a team at the side of the track were uneasy, where the driver had full control of them until at the instant when they dashed on the track in front of the car. *Flaherty v. Harrison*, 98 Wis. 559, 74 N. W. 360.

A motorman is not required to check the speed of his car every time he is notified to do so by the owner of a skittish horse on the street; and his failure to so stop where no imminent peril is indicated will not render the company liable for resulting damages, unless his conduct can be attributed only to malicious disregard of the safety of the injured person. *Molyneux v. Southwick No. Elec. R. Co.*, 81 Mo. App. 25.

In the case of *Cornell v. Detroit Elec. Ry. Co.*, 3 Am. Electl. Cas. 486,

of the wagon; his foot struck the ground, his leg was broken, the team escaped from his control and ran away. The testimony further shows that the injuries which he thus sustained were quite severe, and perhaps permanent. Upon his recovery he commenced this action in the District Court of Lancaster county to recover for

82 Mich. 495, 46 N. W. 791, it appeared that the plaintiff was driving along a street in which the defendant's street car line was constructed. When the defendant's cars were at a distance of 300 or 400 feet his horse became somewhat frightened, and he stopped his horse and put up his hand as a signal for the motorman to stop the cars, and jumped out of his buggy and took the horse by the head. The horse becoming more frightened, the plaintiff led him across the sidewalk into an open field. The horse dragged the plaintiff around the open field and finally turned and dragged him across the street onto the track, where the plaintiff fell and was injured and the horse ran away. When the horse began to run, the cars, according to the plaintiff's own testimony, were about 150 feet distant and slowing down, and stopped before reaching the point in the street where the plaintiff had stopped his horse. The cars were running at an ordinary speed. It was held that there was no negligence on the defendant's part, the motorman not being obliged under the circumstances to immediately stop the car.

Negligence is not shown by the fact that an electric car was not stopped before it reached a horse which was frightened thereby, it not having shown signs of fright until the car was within twenty or thirty feet of it. *Yingst v. Lebanon & A. St. Ry. Co.*, 167 Pa. St. 438, 31 Atl. 687.

b. Failure to stop when fright of horse is observed.—Where a person having control of a street car observes, or should have observed by the exercise of ordinary prudence, that a horse in the street near the track was frightened and likely to become unmanageable because of the approach of the car, and in view of all the circumstances, a man of ordinary prudence would have stopped the car, then the failure to stop the car is negligence. *Gibbons v. Wilkesbarre & S. St. Ry. Co.*, 155 Pa. St. 279, 26 Atl. 417. This rule is based upon the duty of a person in charge of a street railway car to so manage his car as to relieve travelers in the streets from imminent danger arising from the fright of horses occasioned by approaching cars. *Flewelling v. Lewiston & A. H. R. Co.*, 89 Me. 585, 36 Atl. 1056. If the neglect to stop a car was due to a wanton and malicious disregard for the safety of the driver of an unmanageable horse frightened at a car, the right of recovery cannot be questioned. *Chapman v. Zanesville St. Ry. Co.*, 11 Ohio Dec. 449, 27 Wkly. Law Bul. 70. In the case of *Citizens' St. R. Co. v. Lowe*, (Ind. App.) 5 Am. Electl. Cas. 436, 39 N. E. 165, it was said: "Ordinarily, it is true a motorman operating an electric car, who sees a horse and vehicle approaching, has a right to assume that the driver will not attempt to cross the track in front of the moving car, or otherwise come so near as to cause a collision, but rather that he will avoid the same. But when the

the damages caused by his injuries; the trial resulted in a verdict and judgment in his favor for \$3,000, and the traction company prosecuted error therefrom.

The petition on which the cause was tried contained the following allegations of negligence: "The plaintiff alleges that on the

motorman or those in charge of the car see the frightened horse and the vehicle to which he is attached in front of such car, upon the same track, and that the occupants of the conveyance are in apparent peril, due care requires that the car be stopped if it is possible to do so. In such a case it requires those in charge of the motor to slacken the speed and, if necessary to avoid injury, to stop the car entirely." Citing *Railroad Co. v. Carr* (Ind. App.), 37 N. E. 952; *Railway Co. v. Maynard*, 5 Ind. App. 372; *Ellis v. Lynn & Boston R. Co.*, 4 Am. Electl. Cas. 531, 160 Mass. 341, 35 N. E. 1127; *Benjamin v. Holyoke St. Ry. Co.*, 4 Am. Electl. Cas. 517, 160 Mass. 3, 35 N. E. 95.

In the case of *Ellis v. Lynn & Boston R. Co.*, 4 Am. Electl. Cas. 531, 160 Mass. 341, 35 N. E. 1127, it was contended by the defendant that the manager of an electric railway car upon a street is never called upon to stop the car or to change his method of managing it to avoid any danger from the fright of horses other than the danger of collision with the car. The court held that such contention was not maintainable, and said: "It is a well-known fact that most horses are frightened at their first view of a moving electric car, especially if they encounter it in a quiet place away from the distracting noises of a busy city street. It is only by careful training, and a frequent repetition of the experience, that they acquire courage to meet and pass such a car on a narrow street without excitement. The rights of the driver of a horse and the manager of an electric car under such circumstances are equal. Each may use the street, and each must use it with a reasonable regard for the safety and convenience of the other. The motorman is supposed to know that his car is likely to frighten horses that are unaccustomed to the sight of such vehicles, while most horses are easily taught after a time to pass it without fear. It is his duty, if he sees a horse in the street before him that is greatly frightened at the car, so as to endanger his driver or other persons in the street, to do what he reasonably can in the management of his car to diminish the fright of the horse, and it is also his duty in running the car to look out and see whether by frightening horses or otherwise, he is putting in peril other persons lawfully using the street on foot or with teams. In this way the convenience and safety of everybody can be promoted without serious detriment to anybody."

An electric railway company is liable for personal injuries sustained by one whose horse was frightened by an approaching car, and became unmanageable and ran across the track, where the motorman could easily have observed its fright and slackened speed or stopped the car in time to prevent a collision. *Marion St. Ry. Co. v. Carr*, 10 Ind. App. 200, 37 N. E. 952.

said date aforesaid, while he was driving on said highway, one of the said electrical cars, negligently driven by defendant as aforesaid, came at a high rate of speed toward plaintiff, who was driving his team of horses attached to a buggy on said highway, and his team of horses aforesaid became frightened at said electrical

4. Negligence in driving fractious horse near street car.—It is not contributory negligence as a matter of law for a person to drive a horse which is afraid of an electric street railway car upon a street occupied by the electric railway. See *Montgomery St. Ry. v. Hastings*, p. 1, and note thereto on p. 3.

5. Fright of horse caused by unusual noises in connection with street car, or by unusual appearance thereof.—The usual noises incident to running a street car by electricity, causing horses to be frightened, if not unnecessarily made, do not make the street railway company liable for resulting damages. *Doster v. Charlotte St. Ry. Co.*, 117 N. C. 651, 23 S. E. 449, 34 L. R. A. 481. It has also been held that the fact that a street railway company replaced a burned-out motor in one of its cars with a new one, the operation of which for a time produced a loud and unusual noise, did not make the company responsible for injuries caused by a horse which took fright thereby, unless it is shown that the noise was unnecessary as well as unusual. *Hill v. Rome St. Ry. Co.*, 101 Ga. 66, 28 S. E. 631. Nor is a street railway company liable for an injury to one driving along the highway whose horse is frightened by the sudden and unusual noise of the passengers in such car. *Boatwright v. Chester & M. Elec. R. Co.*, 4 Pa. Super. Ct. 279, 40 Wkly. Notes Cas. 330.

If an electric car is operated upon a street with signs or banners appended thereto (*Indianapolis & Greenfield R. T. Co. v. Haines*, 2 St. Ry. Rep. 226, (Ind. App.) 69 N. E. 187), or with other objects attached thereto of such a nature and in such a manner as to be likely to frighten horses, the company operating such car is liable for the injuries resulting therefrom, even if the company had no knowledge of their presence. *McCann v. Consolidated Tract. Co.*, 59 N. J. L. 481, 36 Atl. 388, 38 L. R. A. 236.

6. Rule in respect to fright of horses caused by operation of steam railroads.—Cases which have arisen in respect to the negligence of steam railroad companies in ringing bells, blowing whistles, or letting off steam unnecessarily at places where horses were likely to be near the tracks may be applied by analogy to cases where horses are frightened by the unusual or unnecessary noises incident to the operation of street cars. The following cases pertain to the liability of steam railroads, but will be found useful in determining a similar liability of street railroad companies. A steam railroad company is not held responsible for fright caused by signals which warn others of the approach of its trains, which signals are required either by ordinary prudence in the operation of its trains or by express provision of statute, and are given with ordinary care and due prudence. *Hahn v. So.*

car so operated, ran away, throwing plaintiff from the buggy onto the ground, dragging him a great distance, and inflicting great injuries to the person of this plaintiff." Plaintiff says: "That on the said 29th day of April, 1899, he was traveling eastward in a buggy drawn by two horses upon said public highway leading from

Pac. R. Co., 51 Cal. 605; *Bailey v. Hartford, etc., R. Co.*, 56 Conn. 444, 66 Atl. 234; *Ocheltree v. Chicago, etc., R. Co.*, 96 Iowa, 246, 64 N. W. 788; *Schaefer v. Chicago, etc., R. Co.*, 62 Iowa, 624, 17 N. W. 893; *St. Louis, etc., R. Co. v. Ferguson*, 57 Ark. 16, 20 S. W. 545; *Heininger v. Great Northern R. Co.*, 59 Minn. 458, 61 N. W. 558; *Cahoon v. Chicago, etc., R. Co.*, 85 Wis. 570, 55 N. W. 900. The unnecessary blowing of a whistle after the engineer discovers that a horse driven along a public highway is frightened and that the continuing to blow the whistle will probably cause the horse to be more frightened, is negligence. *Ackridge v. Atlanta & W. P. R. Co.*, 90 Ga. 232, 16 S. E. 81; *Louisville, N. A. & A. Ry. Co. v. Stanger* (Ind. App.), 32 N. E. 209; *Hudson v. Louisville & N. R. Co.*, 14 Bush (Ky.), 303; *Louisville, etc., R. Co. v. Schmidt*, 81 Ind. 264; *Billman v. Indianapolis, etc., R. Co.*, 76 Ind. 166; *Hill v. Portland, etc., R. Co.*, 55 Me. 438; *Gibbs v. Chicago, etc., R. Co.*, 26 Minn. 427, 4 N. W. 819; *Walker v. Boston & M. R. Co.*, 64 N. H. 414; *Bittle v. Camden, etc., R. Co.*, 55 N. J. L. 615, 28 Atl. 305; *Borst v. Lake Shore, etc., R. Co.*, 66 N. Y. 639; *Philadelphia, etc., R. Co. v. Killips*, 88 Pa. St. 405; *Pennsylvania R. Co. v. Barnet*, 59 Pa. St. 259. Where an engineer while running a locomotive back and forth over a track in close proximity to a highway, unnecessarily discharges steam so as to frighten a team on the highway, the company is liable for damages caused thereby. *Terre Haute & I. R. Co. v. Doyle*, 56 Ill. App. 78; *Chicago, etc., R. Co. v. Heinrich*, 157 Ill. 388, 41 N. E. 860; *Lamb v. Old Colony R. Co.*, 140 Mass. 79, 2 N. E. 939; *Omaha & R. V. Ry. Co. v. Clark*, 35 Nebr. 867, 53 N. W. 970, 23 L. R. A. 504 (holding that where a locomotive engineer needlessly opens the valves of his engine while operating it in a city along a street where teams are constantly passing, whereby the plaintiff's horses were frightened, the company is negligent); *Presley v. Grand Trunk Ry. Co.*, 66 N. H. 615, 22 Atl. 554.

For negligent and careless management, causing sudden and unusual noises, whereby horses are needlessly frightened and caused to run and be damaged, an action may be maintained. *Hahn v. So. Pac. R. Co.*, 51 Cal. 605; *Culp v. Atchison & N. R. Co.*, 17 Kan. 475.

The fact that the noise which frightened the plaintiff's team was unnecessary is not sufficient to establish the defendant's negligence; it must have been made under such circumstances as to show a neglect to exercise that degree of care which a reasonable man would have exercised. *Omaha & R. V. Ry. Co. v. Brady*, 39 Nebr. 27, 57 N. W. 767; *Ryan v. Pennsylvania R. Co.*, 132 Pa. St. 304, 19 Atl. 81.

the Hospital for the Insane toward the city of Lincoln. While traveling along said public highway, about 300 feet west of First street, and on what would be a westerly continuation of Van Dorn street, his team became frightened at defendant's electric car, run by defendant in a careless, reckless, and negligent manner, at a high rate of speed, and plaintiff was, by the negligence of the defendant, thrown from his buggy, the team running away," etc. The answer of the traction company was, first, a general denial, and, second, a plea of contributory negligence on the part of the plaintiff.

The traction company contends, first, that the petition does not state facts sufficient to constitute a cause of action and sustain the verdict. This question is not raised properly, either by the motion for a new trial in the District Court, or the petition in error herein; therefore we pass it without further consideration.

It is next urged that the court erred in admitting certain testimony found on pages 88 and 89 of the bill of exceptions. An examination of this evidence discloses that witness Martin, whose testimony was objected to, testified that the street car was going slowly; and it is stated that this evidence ought not to have been received, because it did not sustain the allegations of negligence set forth in the petition, to wit, that the car was running at a high rate of speed. The witness Martin was called for the plaintiff Moore, and it is difficult to see how the evidence thus given by him could in any manner prejudice the rights of the traction company; therefore the court did not err in admitting it.

It is further contended that the verdict and judgment are not sustained by sufficient evidence. This presents the main question in controversy in this case. It will be observed that the allegations of negligence are that the car was negligently operated and driven at a high rate of speed; in other words, that the defendant's car was run in a careless, reckless, and negligent manner at a high rate of speed toward the plaintiff's team, and thereby frightened the same and caused them to run away and throw the plaintiff from his buggy, and thus injure him in the manner complained of. The record shows that the only persons who saw the accident were the plaintiff, Charles Martin, and the witnesses,

Bacon, Pacal, and Mrs. Langdon, and the motorman, Heintzman. We state briefly the substance of the evidence on that point. Moore testified as follows:

"I was driving and the street car was coming round there at a pretty good jog. I can't say how fast they were running, but it was pretty good jog, and they were coming right toward me. The team was walking along, and when they came a little farther along I began to look after the horses; the car was coming right toward them. Martin hallooed to them, 'Why don't you stop that car?' They still kept coming, and when they got right against me the horses jumped sidewise, etc. Q. Now a little bit more about one thing: You testified that Mr. Martin called out to the man running the car to stop. What did he do then; did he stop the car? A. I could not tell you; the car still came on, and the horses took my attention. Q. Did he stop the car? A. I could not tell you; they were coming right toward me, and I was watching the team. I could not tell whether they stopped the car or not. I could not say whether he stopped the car or not." The witness Martin, who was riding with Moore, testified in substance as follows: "We drove round by the asylum, and came onto the bridge by the park. When we got just over the bridge we didn't see anything ahead. We was going along and talking and when we got about 275 yards from the bridge the street car made the turn, coming west. We saw the car make the turn, and it was coming round there pretty lively, and the team pricked up their ears and kind of pranced a little. The car kept coming on and we went about sixty yards when the horses commenced to act up a little harder. We didn't get quite sixty yards when they commenced to side off and get away from the car. The car was probably fifty or sixty yards away then. The team was trying to go toward the ditch, and I seen there was going to be trouble. I says, 'We are going to have trouble here; this is a narrow road.' He says, 'Oh, I don't think we will;' and I hallooed to the street car man to hold up. I says, 'Stop the car a minute,' and he did slack up the car, and the team began to quiet down a little, and then he commenced to kind of creep on. He was watching the team, and kept the car going on a kind of creep. We were about fifty or sixty yards from the car when I hallooed to stop the car, and the motorman slowed up and stopped, and then started the car again kind of easy, and kind of creeping, and watching the team at the same time. I didn't have time to halloo any more. Just as the car got within two lengths of us the team dove right into the ditch. The car was going very slow. I yelled to the motorman as soon as I thought there was any danger. We didn't turn round because we didn't think the team would be frightened. We didn't want to turn round; we didn't know whether the team would be frightened or not."

Heintzman, the motorman, testified in substance as follows:

"I had probably gone about forty or fifty feet around the curve when I noticed the team shying and getting scared. I commenced stopping my car as

quick as possible. I was going round the curve probably at the rate of four or five miles an hour. It is not possible to go fast around the curve; not at full speed. I slowed up the car and cut off the current. I stopped the car and cut off the current as soon as I could after I noticed the team became frightened. The team finally got away from him; they left the road, I should judge, ten or fifteen feet ahead of the car and ran over to the ditch, and about that time was when the dashboard gave way and threw Moore forward right onto the horses, and that started them to kicking and running faster, and then they went by the car and turned back into the road. All this time the car was standing still. I stopped the car as soon as I could."

The witness Bacon, who was riding in a buggy with Mrs. Langdon, a few feet behind Moore's team, testified, in regard to the operation of the car, as follows:

"I first noticed the street car about fifty or seventy-five feet before they made the turn. I saw them when they rounded the curve, and I could not tell how fast they were coming, but about the usual speed. When the car came round the curve I guess I was about a block away; Mr. Moore was about three rods ahead of us. I noticed his team beginning to get frightened at the car as soon as it made the turn and was coming directly toward us. Mr. Moore's team at that time was about 125 feet away from the car. The man in charge of the car shut down and stopped as soon as he could."

Mrs. Langdon's testimony was, in substance, that

"after the car came around the curve Mr. Moore's team were frightened and became fractious and were plunging. The car stopped, or came very slowly on round the curve. It slowed up. It appeared that the motorman had noticed the horses, and he slowed up. I could not tell how much, but much slower than the car ordinarily runs. The car finally stopped. The team had almost reached the car when the car stopped.

Pacal who was on the car, testified that it was stopped as soon as the horses showed fright.

This is all of the testimony bearing on the question of negligence, and it fails to support the allegations of the plaintiff's petition, and does not show any negligence in the operation of the car. On the contrary, it conclusively shows that the car was going slowly, and as soon as the team showed fright the motorman slowed down, and finally stopped it. The petition contained no general allegation of negligence, neither was there any testimony offered to show negligence on the part of the company, other

than in the operation of the street car. In the case of *Eastwood v. La Crosse City Ry. Co.* (Wis.), 68 N. W. 651, it appeared that the plaintiff's horses became frightened at the noise made by the car while it was yet some distance away. As the car approached, the motorman saw that the horses were frightened, and turned off the current and applied the brake. The horses backed toward the sidewalk, throwing the rear end of the sleigh upon the track, where it was struck by the car, which could not be brought to a stop quick enough to avoid it. The car when first seen was about 175 feet away, and when the brakes were applied it was about eighty feet away. And the court held that these facts did not justify an inference that the motorman was negligent. This rule, also, is firmly supported by *Nellis Street Surface Railroads*, 329; *Booth Street Railways*, 401; and *Cornell v. Street Ry. Co.* (Mich.), 46 N. W. 791; *Terre Haute El. Ry. Co. v. Yant* (Ind. App.), 51 N. E. 732, 69 Am. St. Rep. 376; *Flaherty v. Harrison* (Wis.), 74 N. W. 360. We are, therefore, constrained to hold that the evidence adduced on the trial was not sufficient to support the verdict and the judgment of the District Court, and for that reason the judgment must be reversed and a new trial ordered.

Many other errors are assigned for the reversal of the judgment, but it is unnecessary to consider them. Upon another trial all such errors, if any, will, without doubt, be corrected. For the foregoing reasons, we recommend that the judgment of the District Court be reversed and the cause remanded for a new trial.

ALBERT and GLANVILLE, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the District Court is reversed, and the cause remanded for a new trial.

Omaha Street Railway Co. v. Larson.

(Nebraska—Supreme Court.)

1. **COLLISION WITH VEHICLE; DUTY OF MOTORMAN TO AVOID ACCIDENT.**—Negligence of plaintiff in driving across a street railway track without stopping to look and listen will not excuse the company from its duty to use reasonable diligence to stop its car after discovering the perilous situation, and, if its failure to do so after seeing the danger directly and immediately causes an injury to him, the company may be held liable for such injury.
2. **CONFLICTING EVIDENCE.**—Where the evidence is fairly conflicting, the question as to the direct and proximate cause of an alleged injury is one of fact, for the determination of the jury.
3. **PROOF OF EXPERIMENT.**—Proof of an experiment, without establishing the fact that the person who made the experiment is competent to do so, and that the apparatus used was of the kind and in a condition suitable for the experiment, and that it was honestly and fairly made, is without probative force.
4. **OPINION EVIDENCE.**¹—A witness who sees a moving car, and possesses a knowledge of time and distance, is competent to express an opinion as to the rate of speed at which the car was moving.
5. **PROOF OF ORDINANCE.**—Evidence of an ordinance of a city regulating the rate of speed of street railway cars is admissible under a general averment of negligence.

(Syllabus by the court.)

ERROR by defendant from judgment for plaintiff. Decided December 16, 1903. Reported (Nebr.) 97 N. W. 824.

1. OPINION EVIDENCE AS TO SPEED.

1. Who may testify as to speed of car.
 - a. In general.
 - b. Speed not subject of expert testimony.
 - c. Passengers riding on street car.
2. Purpose and effect of testimony.
3. Opinion as to speed based on sound.
4. Facts upon which opinion is based.

1. Who may testify as to speed of car. a. In general.—Opinions of witnesses, not experts, are ordinarily inadmissible. This rule applies to all questions where the facts are susceptible of actual statement. It has been held that the rate of speed at which a motor car is running, which is not actually measured, can be given only by the opinions of witnesses; such

John L. Webster, for plaintiff in error.

Gaines, Kelby & Story, for defendant in error.

Opinion by OLDHAM, C.

This is an action to recover damages alleged to have been sustained by reason of the negligence of the Omaha Street Railway Company. The allegations of the petition that are material to an understanding of this controversy are:

"On September 16, 1899, plaintiff, with his horse and wagon, was driving northward on Military avenue, in Omaha, and when about halfway between Parker and Decatur streets in said city, on the east side of Military avenue,

opinions only are allowable when given by persons peculiarly skilled on the question upon which they are called to give evidence. Witnesses not shown to have any special experience in determining the rate of speed at which a car was running at the time of the injury are not competent to give opinions on that subject. *Francisco v. Troy & Lansingburgh R. Co.*, 78 Hun (N. Y.), 13, 29 N. Y. Supp. 247.

b. *Speed not subject of expert testimony.*—The weight of authority seems to favor the proposition that the speed of a railroad train is not purely within the knowledge of experts, and not, therefore, the subject of expert testimony. While a witness, to give testimony upon that subject, must have some knowledge or experience in respect to it, he is not required to have the degree of knowledge peculiar to experts called upon to testify when expert testimony is required, and give opinions based upon hypothetical questions. *Sculley v. N. Y., L. E. & W. R. Co.*, 80 Hun (N. Y.), 197, 30 N. Y. Supp. 61; *Northrop v. N. Y., O. & W. Ry. Co.*, 37 Hun (N. Y.), 295. See also *Highland Ave. & B. R. Co. v. Sampson*, 112 Ala. 425, 20 So. 566 (holding that any one competent as a witness may testify to the speed of a train at the time of an accident); *Chicago, B. & Q. R. Co. v. Gunderson*, 174 Ill. 495; *Louisville, N. A. & C. Ry. Co. v. Hendricks*, 128 Ind. 462, 28 N. E. 58 (holding that a person who lives in sight of the railroad where the accident occurred is competent to testify as to the speed of the train on which the plaintiff was injured, he having seen the accident, although he is not an expert); *Pence v. Chicago, R. I. & P. Ry. Co.*, 79 Iowa, 389, 44 N. W. 686; *Louisville, C. & L. R. Co. v. Ramsey*, 3 Ky. L. Rep. 385; *Thomas v. Chicago & G. T. Ry. Co.*, 86 Mich. 496, 49 N. W. 547; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99 (holding that any person who saw the accident, possessing a knowledge of time and distance, is competent to express an opinion upon the rate of speed at which a train was running); *Chicago, B. & Q. R. Co. v. Clark*, 26 Nebr. 645, 42 N. W. 703; *Chipman v. Union Pac. Ry. Co.*, 12 Utah, 68, 41 Pac. 562; *Ward v. Chicago, St. P., M. & O. Ry. Co.*, 85 Wis. 601, 55 N. W. 771.

desiring to cross to the west side of said Military avenue, turned his horse to do so, but, as the horse stepped between the two east rails of defendant's tracks on said street, a motor car belonging to defendant, propelled by electricity, and running at a dangerously and negligently high rate of speed, and without any warning to plaintiff, negligently ran into and struck plaintiff's horse which was hitched to the wagon in which plaintiff was riding, and said horse became entangled in the fender on the front end of defendant's said motor car. Plaintiff says that, when defendant's motor car struck his horse as

A witness who stated that he had timed the running of electric cars once, on another road; that he had noticed the speed of steam cars; that he had noticed horses trot and run and knew the rate of speed at which they were going, and had made calculations of their rate of speed, was held competent to testify as to how fast, in his opinion, a car was going when it struck the plaintiff. *Strauss v. Newburgh Elec. Ry. Co.*, 6 App. Div. (N. Y.) 264, 39 N. Y. Supp. 998.

The speed at which a street car was going at a given time is not a question of expert testimony, but any witness who saw it may state his opinion as to its speed; the weight to be given such opinion being a matter for the jury to determine in view of his experience and the other facts shown. *Robinson v. Louisville R. Co.*, 112 Fed. 484, 50 C. C. A. 357. A boy who has testified that he has timed himself while walking and ascertained the rate at which he could walk may express an opinion as to the rate of speed of an electric car when he observed it. *Penny v. Rochester R. Co.*, 7 App. Div. (N. Y.) 595, 40 N. Y. Supp. 172.

c. Passengers riding on street car.—Persons who have been accustomed to riding upon street cars, where it has been shown that the schedule and statutory rate of speed of the cars is the same, may testify that the car was running very fast and at an unusual rate of speed, for the purpose of showing that it was going at a prohibited rate. *Nellis Street Railroad Accident Law*, p. 553. The fact that a witness was a passenger on a street car, rather than a bystander, does not disqualify him from testifying as to the approximate speed at which the car was running, where it was shown that he had been accustomed to ride on the line, and knew what the usual rate of speed was. *Johnson v. Oakland, etc., Ry. Co.*, 127 Cal. 608, 60 Pac. 170.

While the speed of a train is not a matter for scientific testimony, it cannot be shown from the opinion of passengers, observing only from the inside, unless their experience and observation is such as to make their judgment reliable. *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321.

2. Purpose and effect of testimony.—Opinion evidence as to the speed of street railway cars is admissible for the purpose of determining definitely the rate of speed of the car. A witness should not be allowed to testify that he saw a car "going down at a terrible speed," since such testimony conveys to the jury no measurement of the rate of speed, except that it was at such a rate that the witness disapproved. *Chicago City Ry. Co. v. Wall*,

aforesaid, the motorman in charge of said car, both seeing and knowing the imminent danger in which plaintiff was placed by the negligence of said defendant, and having the power to stop said car, in absolute disregard of defendant's duty to stop said car and avoid injury to plaintiff negligently failed even to diminish the speed of said car, but, on the contrary, said motorman continued to run said car at great speed for about the total distance of a block, pushing, dragging, and carrying plaintiff's horse and wagon for the entire distance. Plaintiff says that, after defendant's motor car struck

93 Ill. App. 411. Where a witness had stated that she knew when cars were running at full speed and when they were not, she should be asked whether the car which struck the deceased was or was not at the time running at full speed, the weight of evidence being for the jury. *Potter v. O'Donnell*, 199 Ill. 119, 64 N. E. 1026. And where a witness had testified that a car was going at a certain rate of speed, he may properly be allowed to further testify that it was going faster than a man could run. *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262. In the case of *Galveston, H. & S. A. Ry. Co. v. Wesch*, 85 Tex. 593, it was held proper to permit a witness for plaintiff to testify upon cross-examination that the rate of speed at the time of the accident was such that "all were nervous and apprehensive, and the effect and sensations were those of very fast speed, and what seemed to me reckless speed." See also *Galveston, H. & S. A. Ry. Co. v. Duelm* (Tex. Civ. App.), 23 S. W. 596. And in the case of *Sears v. Seattle Consol. St. Ry. Co.*, 6 Wash. 227, 33 Pac. 389, a witness, after relating his observations at the time of the accident as to the rate of speed of the car, and the exertions of the motorman to stop it, was permitted to express an opinion as a conclusion of fact that the motorman was unable to stop the car sooner because he was "running at too high a speed to stop it in that distance." But in the case of *Citizens' St. R. Co. v. Spahr*, 7 Ind. App. 23, 33 N. E. 446, the defendant sought to show by a witness that "people were not in the habit of trying to get on a street car at the rate of speed" the car in question was going at the time of the accident, and it was held that the evidence was properly excluded, as it called only for a conclusion of the witness as to the speed of the car.

3. **Opinion as to speed based on sound.**—The testimony of witnesses as to the speed of a train, based on the sound heard by them while in the vicinity of the train, is admissible. *Van Horn v. Burlington, C. R. & W. Ry. Co.*, 59 Iowa, 33, 12 N. W. 752; *Missouri Pac. Ry. Co. v. Hildebrand*, 52 Kan. 284, 34 Pac. 738.

4. **Facts upon which opinion is based.**—The general rule is that a non-expert witness must, in giving an opinion, state the facts upon which that opinion is based, as far as possible. *Andrews v. Jones*, 10 Ala. 460; *Ford v. Kennedy*, 14 Ga. 537; *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138, 1 N. E. 364, 52 Am. Rep. 653; *Hunt v. Hunt*, 3 B. Mon. (Ky.) 575; *Gentry v. McMinnis*, 3 Dana (Ky.), 382; *Hardenburg v. Cockroft*, 5 Daly (N. Y.), 79.

his horse as aforesaid, defendant's motorman who was in charge of said car, and who could have stopped said car, and whose duty it was to stop said car, negligently continued to run it at great speed, whereby plaintiff was greatly and seriously injured, without the fault of plaintiff, for, after defendant's motor had, as aforesaid, pushed, dragged, and carried plaintiff's said horse and wagon for about 120 feet, plaintiff was forcibly and violently thrown from his wagon and hurled to the pavement, and was seriously and severely cut, injured, and bruised about his head, back, spine, and legs, his right leg being so badly broken that it was necessary, in order to save plaintiff's life, to amputate his leg, which was accordingly done, whereby the plaintiff was made to suffer great pain and physical and mental anguish, and has become a cripple for life, and plaintiff still suffers from the injuries sustained by him in his head and spine."

Defendant answered with a general denial, coupled with a plea of contributory negligence. The reply was a general denial. There was a trial to a jury, verdict for plaintiff, judgment on the verdict, and the defendant brings the case to this court on error.

It will be observed that the charge of negligence in the petition was the failure of the defendant to check the speed of the car and stop it after the impact of the car with the horse and wagon, and that by its want of care in this particular the injury was occasioned. This is the sole issue of negligence tendered by the petition. At the outset it is insisted by the defendant street railway company that plaintiff has no right to maintain an action for defendant's failure to use diligence in stopping its car, without showing himself free from negligence in going on the track; that the subsequent negligence, if any, of the company is indivisible from the negligence of Larson in the first instance, and if, as alleged by defendant, he drove on the track without stopping to look and listen, such contributory negligence on his part constitutes a complete defense to the action. On the question as to whether the defendant used ordinary diligence in attempting to stop the car after the impact with defendant's horse and wagon, the testimony is fairly conflicting. Plaintiff's evidence tends to show that defendant was dragged about 116 feet after the impact before the vehicle was overturned and the injury inflicted. Defendant's testimony, on the other hand, tended to show that the injury was inflicted within a few feet of the place of contact, and that reasonable efforts were used to stop the car after the collision.

The question then arises as to whether plaintiff's evidence tends to show an intervening efficient cause, which of itself directly and immediately occasioned the injury. The test is, was the failure to stop the car a new and independent force, acting in and of itself in causing the injury? If so, it superseded the alleged contributory negligence complained of, so as to make plaintiff's want of proper care in driving on the track remote in the chain of causation. This view is supported by numerous decisions of this court. In *Dailey v. Railway Co.*, 58 Nebr. 396, 78 N. W. 722, the court, speaking through Harrison, C. J., says:

"It is a well-established doctrine that, notwithstanding a person may have so placed himself as to be liable to injury, yet, if another, after knowledge of the fact, inflict injury because of the failure of the latter to exercise ordinary care to avoid it, the former may recover damages. The same doctrine is announced in *Railway Co. v. Mertes*, 35 Nebr. 204, 52 N. W. 1099; *Railway Co. v. Hedge*, 44 Nebr. 448, 62 N. W. 887; *Railway Co. v. Martin*, 48 Nebr. 65, 66 N. W. 1007."

The petition is framed in accordance with this doctrine, and, in our view, states a good cause of action; and whether or not the failure to use diligence in stopping the car after the collision was the direct cause of the injury was a question of fact to be determined by the jury. *Railway Co. v. Hedge*, *supra*; *Railway Co. v. Kellog*, 94 U. S. 469, 24 L. Ed. 256; *Purcell v. Railway Co.*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; *Railway Co. v. Kassen*, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674.

It is further urged by the company that the court erred in refusing to permit it to prove the result of an experiment made in stopping this same car at the place of the accident. This experiment was made by one Rollo during the first trial of this case. Rollo was not offered as a witness to prove this, but the company offered to prove the result of this experiment by onlookers. While experiments are sometimes admitted to illustrate a given subject, we are not aware of any rule that permits onlookers to testify as to the result without laying the foundation, and showing that the result of the experiment can be relied on as a substantive fact. This means that, as a foundation for this testimony, it must be shown that the person who makes the experiment is competent to do so, that the apparatus used was of the kind and in the con-

dition suitable for the experiment, and that the experiment was honestly and fairly made. Without these facts established, the result is without probative force.

It is claimed that the court erred in permitting plaintiff's witnesses to testify as to the speed the car was running. The objection is based upon the theory that they were incompetent, for lack of experience in such matters. We think that a witness who sees a moving car, and possesses a knowledge of time and distance, is competent to express an opinion as to the rate at which the car is moving. In *Detroit & Milwaukee R. Co. v. Steinburg*, 17 Mich. 99, Cooley, J., in rendering the opinion, says:

"The point to which the attention of the witness was directed was the speed of the passing object. The motion of a train was to be compared to the motion of any other moving thing, with a view of obtaining the judgment of the witness as to its velocity. No question of science was involved, beyond what may have been, had the object been a man or a horse. It was not, therefore, a question for experts. Any intelligent man who has been accustomed to observe moving objects may be able to express an opinion of some value upon it the first time he ever saw a train in motion. The opinion would not be so material and reliable as that of one accustomed to observe, with timepiece in hand, the motion of an object of such size and momentum; but this would go to the weight of the testimony, and not to its admissibility. Any one possessing the knowledge of time and distance would be competent to express an opinion upon the subject." *Chapman v. Railway Co.*, 12 Utah, 68, 41 Pac. 562; *Walsh v. Railway Co.*, 102 Mo. 582, 14 S. W. 873, 15 S. W. 757; *Covell v. Railway Co.*, 82 Mo. App. 187.

It is also contended that the trial court erred in admitting in evidence an ordinance of the city of Omaha limiting the speed of street cars upon certain streets of the city, including Military avenue. This is objected to on two grounds: (1) That it was not pleaded in the petition that the car was being run in violation of the ordinance; and (2) that it was immaterial under the issues.

As to the first ground of objection, we think that evidence of an ordinance and its violation is admissible under a general averment of negligence, where this question is material in a case. The reason is stated in *Faber v. Railway Co.*, 29 Minn. 465, 13 N. W. 902:

"The fact that the rate of speed at which the train was run was prohibited by the municipal law was competent evidence going to prove negligence, and, being evidence of the fact pleaded, it might be proved, although

the existence of the ordinance had not been alleged in the complaint." *Railway Co. v. Rasmussen*, 25 Nebr. 810, 41 N. W. 778, 13 Am. St. Rep. 527; *Railway Co. v. Duvall*, 40 Nebr. 29, 58 N. W. 531; *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548; *Watson Damages and Personal Injuries*, § 277.

This brings us to the second ground of objection. As a matter of fact, the speed at which the car was running before it struck the wagon has nothing to do with this case, except as a circumstance tending to show a want of proper care in stopping the car. The only act of negligence charged was the failure to check the speed and stop the car after the car had struck the horse and wagon, and for this reason this evidence had only an indirect bearing on the issues; and in the very able brief of the eminent counsel for the company there is nothing pointed out that suggests prejudice to defendant in its admission. The law does not condemn error in the abstract, but only such as is prejudicial.

The defendant company also complains of instructions numbered 1, 5, 6, and 7, given by the court on its own motion. The principal objection to each of these instructions is that they were drafted upon the theory that the plaintiff could recover if the motorman was negligent in not stopping the car after it had struck the horse and wagon, notwithstanding the fault of plaintiff in negligently driving upon the track of the company. What has already been said disposes of these objections. We think the instructions, as a whole, fairly and fully directed the jury on each material fact at issue, and were as favorable to defendant as the law and evidence warranted.

There is no dispute as to the extent of the injury, nor is there any claim that the damages awarded are excessive.

We find no prejudicial error in the record, and it is, therefore, recommended that the judgment of the District Court be affirmed.

AMES and HASTINGS, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

Reagan v. Manchester Street Railway Co.

(New Hampshire — Supreme Court.)

EVIDENCE AS TO EXCESSIVE SPEED; RESPONSIVENESS.—In an action for injury caused by a collision where the contention of the plaintiff was that a street railway company habitually ran its cars past the place of accident at a high rate of speed, the answer of a witness having a tendency to support such contention is not incompetent because not responsive. Where no objection is raised upon the trial to evidence as too remote, that objection would be regarded in the appellate court as waived.

EXCEPTION by defendant to verdict for plaintiff. Decided November 3, 1903. Reported 72 N. H. 298, 56 Atl. 314.

The cause of the collision was alleged to be negligence in running the car at excessive speed, and failure to exercise care to avoid injury to the plaintiff after discovering him in a place of danger. The plaintiff introduced evidence that the defendants habitually ran their cars past the place of collision at a high rate of speed. A witness who had been employed as a motorman by the defendants for a number of years prior to the accident was called as an expert by the plaintiff, and testified that at the place of the accident, upon a dry track, a car ought to be stopped in its length, or about thirty feet. He was then asked whether that would be true if the speed of the car was twenty miles an hour. To this inquiry he replied, "I have been through there a good many times twenty miles an hour." To this answer the defendants excepted.

Brown, Jones & Warren and *Robert L. Manning*, for plaintiff.

Taggart, Tuttle & Burroughs and *Louis E. Wyman*, for defendants.

Opinion by PARSONS, C. J.

The answer objected to was not incompetent merely because irresponsible. *Glauber Mfg. Co. v. Voter*, 70 N. H. 332, 333, 47 Atl. 612. If the answer had some tendency to support the plaintiff's contention that the defendants habitually ran their cars past the place of collision at a high rate of speed, it could not be excluded for that reason. *Smith v. Railroad Co.*, 70 N. H. 53, 47 Atl. 290, 85 Am. St. Rep. 596; *Davis v. Railroad Co.*, 68 N. H. 247, 248, 249, 44 Atl. 388. If the objection was that the particular piece of evidence was too remote, the question, if raised, was one de-

terminable by the Superior Court. *Proctor v. Freezer Co.*, 70 N. H. 3, 4, 45 Atl. 713; *Nutter v. Railroad Co.*, 60 N. H. 483, 485. As no ruling upon the question was requested at the trial, the objection, if tenable, must be regarded as waived. *Bundy v. Hyde*, 50 N. H. 116, 122; *Carter v. Beals*, 44 N. H. 408, 411. The evidence had some tendency to establish the witness' qualification to answer the inquiry made of him. Being competent for this purpose, the evidence was admissible, and could not be excluded if incompetent upon other issues. *Smith v. Morrill*, 71 N. H. 409, 52 Atl. 928; *Rogers v. Kenrick*, 63 N. H. 335.

Exception overruled.

BINGHAM, J., did not sit. The others concurred.

Batchelder v. Manchester Street Railway Co.

(New Hampshire — Supreme Court.)

INJURY TO PASSENGER ATTEMPTING TO BOARD STREET CAR BY BEING PUSHED UNDER THE CAR BY A CROWD; EVIDENCE.—The plaintiff when attempting to enter a street car was pushed under the car by a large number of persons attempting to enter the car at the same time. In opening the case the plaintiff's counsel stated that he desired to show the conduct of similar crowds at the place where the accident occurred prior thereto, and the defendants objected. The court directed the counsel to omit further reference to the matter until the testimony was offered. At a hearing before the court in the absence of the jury, the question of the admissibility of testimony relating to the conduct of similar crowds on prior occasions was argued by the counsel. The court excluded the testimony as incompetent. Notwithstanding the ruling, the plaintiff's counsel questioned a witness in the presence of the jury as to prior crowds at such place in such a manner as to suggest the testimony which he desired to introduce. It was held that the plaintiff's counsel in failing to submit to the court's ruling in respect to the testimony was guilty of misconduct prejudicial to the defendants' rights, for which the verdict for the plaintiff should be set aside.

EXCEPTIONS by defendants from judgment for plaintiff. Decided December 1, 1903. Reported 72 N. H. 329, 56 Atl. 752.

The evidence tended to prove the following facts: The defendants operated a line of street railway between the city of Manchester and Massabesic lake in the summer of 1900, and at the latter place maintained a pavilion and a

theater. They transported large crowds of people to and from the pavilion. On the evening of August 28th, the plaintiff, having attended the theater, was attempting to get upon a car to return to the city, when she was pushed under the car by the crowd and injured, in consequence of the failure of the defendants to take the precautions required by ordinary care to guard their passengers from injury. The plaintiff's counsel having stated in his opening to the jury that he desired to show the conduct of similar crowds at that place prior to the time of the accident, and the defendants objecting, the court directed the counsel to omit further reference to the matter until he offered the testimony. At the conclusion of the opening, counsel said: "Now, gentlemen, that is how the accident happened, and the blame we attach to the street railway is just this: That, with a full knowledge of conditions out there, they ran their car around that curve at a speed which was too rapid, under the circumstances; that, with those people hanging onto the sides of the car and being carried along with it, they ran it farther down into the crowd that stood waiting for it on both sides of the track, and beyond the place where they are required to stop, the length of a car, striking against this girl, throwing her down under the car, and getting her foot under the wheels." The defendants excepted to this statement. At a hearing before the court in the absence of the jury, the question of the admissibility of testimony relating to the conduct of similar crowds on prior occasions was argued by counsel. The plaintiff offered to show "that other crowds, similar in numbers and character to the one at the time of the accident, assembled at the same place for the same purpose on almost all fair evenings during the summer of 1900 up to the time of the accident, and that, after the extra cars had gone at the close of the theater performance, a portion of them always went to the curve next north of the pavilion and attempted to board the cars — some of them seizing the grab-rails and running along with the car into the main body of the crowd, which always closed in and rushed and scrambled to get aboard of the car." The court excluded the testimony as a matter of discretion and because of its incompetency, and the plaintiff excepted to each ground of the ruling. The plaintiff's counsel asked a witness called by her immediately after the foregoing ruling, and who, it appeared, had been to the lake frequently on the defendants' cars prior to the accident that summer, the following questions, each of which was excluded, subject to the plaintiff's exception: "How did those crowds to which you have just referred compare with the one on the night of the accident in other respects than as to numbers? What was the conduct of these crowds to which you have referred as being there previous to the accident, in regard to boarding or attempting to board the cars as they came in at or near the north curve? What was the custom or general practice of the crowds to which you have referred as to catching hold of the grab-rails on the east side of the car at or near the north curve, and running along with it until the car stopped, upon the occasions when you were there during the summer of 1900, previous to the accident?" After the court had excluded the questions, the defendants excepted to the statement of them in the presence of the jury.

During the cross-examination of a witness for the defendants, a discussion arose respecting the competency of a question proposed by the plaintiff's counsel, who affirmed, in substance, that a much less degree of care would be required in the operation of the cars if there were a rail or some contrivance to keep people from getting on and off the cars while in motion than if there were none. The defendants' counsel said: "That depends upon the crowd." The plaintiff's counsel replied: "I have shown that. I offer now to show your conduct there with previous crowds that year and years before." The defendants excepted to this remark.

Brown, Jones & Warren, for plaintiff.

Taggart, Tuttle & Burroughs, for defendant.

Opinion by CHASE, J.

The ruling of the court excluding the testimony offered by the plaintiff was the law of the trial, even if upon further examination it should be found that the testimony was competent (*Bullard v. Railroad Co.*, 64 N. H. 27, 5 Atl. 838, 10 Am. St. Rep. 367; *Felch v. Railroad Co.*, 66 N. H. 318, 320, 29 Atl. 557; *Mitchell v. Railroad Co.*, 68 N. H. 96, 34 Atl. 674; *Tyler v. Railroad Co.*, 68 N. H. 331, 44 Atl. 524; *Shute v. Company*, 69 N. H. 210, 40 Atl. 391), and did not fall within the class of testimony which the court may, in the exercise of their discretion, reject or receive according as they find that its bearing upon the main issues of the trial is or is not remote. The exception afforded the plaintiff full protection from the evil results of any error in the ruling. It was her duty and the duty of her counsel to submit to the ruling modestly, however confidently they questioned its correctness, and to avoid any attempt to influence the jury to disregard or override it. An orderly and fair trial of a case cannot be had without a rule of this kind.

The particular questions for consideration are whether this duty was violated, and, if so, whether the defendants' rights were prejudiced by the violation. The first of these questions must be answered in the affirmative. The ruling made in chambers was unambiguous, and included all the points covered by the three questions that were asked the witness in the presence of the jury. There was no necessity for asking the questions to preserve the plaintiff's rights. As has been previously remarked, her rights

were fully protected by the exception taken in chambers. No excuse has been offered for asking the questions, and no reasonable excuse is apparent. There was a plain violation of duty on the part of counsel, and the plaintiff's verdict must be set aside in consequence of it, if it does not clearly appear that the defendants' rights were not prejudiced thereby.

Two reasons are given by the plaintiff for her position that the asking of the questions was harmless to the defendants. She says, in the first place, that the evidence called for by the questions was competent. A corollary of this proposition is that if the jury inferred answers that were favorable to the plaintiff, and considered them in arriving at a verdict, no wrong was done, for the jury should have had the testimony laid before them under a ruling of the court. Aside from the necessity, already alluded to, of having the court's rulings implicitly regarded as the law of the trial both by the counsel and the jury, there is a further conclusive answer to this position, namely, that the testimony went before the jury without the safeguards arising from a cross-examination of the witness, and with no opportunity for the defendants to introduce opposing testimony. Though the defendants asked for the ruling, they are not in fault because of it. They had a right to oppose the reception of any testimony which they believed to be incompetent. The plaintiff, and the plaintiff alone, must be held responsible for the one-sided character of the trial, so far as this testimony rendered it one-sided.

The plaintiff further says that no testimony was introduced by the questions, and that the jury could not draw inferences unfavorable to the defendants from the asking of them. It is true that the questions are not in a declarative form, but they are very suggestive of the testimony which the plaintiff was seeking, and the suggestion becomes more definite as the questions multiply. The jury might not be able to infer from the first question what particular conduct the counsel had in mind. The second question makes this plainer: "What was the conduct of these crowds * * * in regard to boarding or attempting to board the cars as they came in at or near the north curve?" The last question is more definite still, and states (in an interrogative form, to be sure) the substance of the testimony which the plaintiff wanted to

lay before the jury: "What was the custom or general practice of the crowds * * * as to catching hold of the grab-rails on the east side of the car at or near the north curve, and running along with it until the car stopped, upon the occasions when you were there during the summer of 1900, previous to the accident?" The mere putting of the question conveyed to the jury the information that on previous occasions during the summer of 1900 crowds of people boarded or attempted to board the defendants' cars at or near the curve, and that it was the custom of the crowds to lay hold of the grab-rails on the east side of the car at or near the curve, and run along with the car until it stopped. Under the court's ruling, it was not proper for the jury to have this information. The fact that the information was conveyed to them by means of questions, instead of declarations, is immaterial. *Demars v. Company*, 67 N. H. 404, 407, 40 Atl. 902; *Dow v. Weare*, 68 N. H. 345, 346, 44 Atl. 489. The multiplication and progressive suggestiveness of the questions rendered them more impressive. The subsequent offer to show the defendants' previous conduct with crowds that year and years before, made by the plaintiff during a discussion relating to the competency of proffered testimony, again called attention to the matter in an emphatic manner, and had a tendency to deepen the impression made by the questions. The remark of the defendants' counsel, to which the offer was a reply, must be understood as referring to the size of the crowd, not its conduct. In view of the ruling in chambers, and its repetition when the questions were asked, the making of the offer was not justifiable. *Little v. Railroad Co.*, 72 N. H. 61, 55 Atl. 190. While the allusion to the matter in the opening statement to the jury is not of itself sufficient ground for disturbing the verdict, it had a tendency to increase the liability of the questions to affect the fairness of the trial. The natural tendency of the counsel, as a whole, was to influence the jury to believe that the action of the crowds on previous occasions was such as to endanger the safety of persons desiring to board the defendants' cars, and to make it their duty, in the exercise of reasonable care, to take special precautions to guard against the danger. It does not clearly appear that the conduct did not have this effect, and was not prejudicial to the defendants. The failure of the plain-

tiff to pursue the course suggested in *Bullard v. Railroad Co.*, 64 N. H. 27, 5 Atl. 838, 10 Am. St. Rep. 367, prevents her from asserting here that it did not have such effect in fact.

Exception sustained. Verdict set aside. New trial granted. All concurred.

Carney v. Concord Street Railway Co.

(New Hampshire — Supreme Court.)

1. COLLISION WITH CHILD ON TRACK; CONTRIBUTORY NEGLIGENCE.¹—The plaintiff's child, a boy twenty-one months old, was struck by one of the defendant's cars, resulting in the child's death, either by being run over by the car, or by the acts of the defendant's servants and employees in attempting to extricate him from under the car. It was held that the child being so young as to be incapable of exercising care for its safety, and the negligence of his parents, if any, not being imputable to him, there is no question of contributory negligence in the case.
2. INJURY TO TRESPASSER ON TRACK.—If the plaintiff's child was regarded as a trespasser the defendant was not relieved by that fact from exercising ordinary care to prevent injuring him after it discovered, or ought to have discovered, his presence on the track. In view of the evidence the question as to whether the motorman would have discovered the presence of the child in a position of apparent danger in time to have stopped the car before reaching him, if he had exercised ordinary care in looking out for persons at the crossing where the collision occurred, is for the jury to determine.

1. Other cases reported in this series pertaining to the negligence of street railway companies in causing injuries to children upon or near tracks are cited in the note to *Jett v. Central Elec. Ry. Co.*, *ante*, p. 513. As to the degree of care required of a child injured in a collision with a street car, see note to *McDermott v. Boston Elev. Ry. Co.*, 325. As to negligence of parents imputed to children, see note to *United Rys. & Elec. Co. v. Biedler*, *ante*, p. 391.

Collision with children on or near tracks.—The mere fact that a child when injured was playing upon the tracks cannot relieve a street railway company of liability for its negligence. *Mitchell v. Tacoma Ry. & Motor Co.*, 9 Wash. 120, 37 Pac. 341. It is the duty of a motorman on approaching a crossing or any other place where he has reason to suppose that children may be engaged in coasting or other play to keep watch and sound a warning, although the conduct of such children in being upon the track is unlawful. *Strutzel v. St. Paul City R. Co.*, 47 Minn. 543, 50 N. W. 690. In the case of *Perry v. Macon Cons. St. R. Co.*, 101 Ga. 400, 29 S. E. 304, it was held

3. **NEGLECTANCE OF DEFENDANT IN EXTRICATING CHILD; EXERCISE OF BEST JUDGMENT.**—In view of the evidence as to the means devised by the conductor of the car in extricating the plaintiff's child from under the car, it was held proper to submit to the jury the question as to whether the conductor exercised ordinary care and did that which a person of average prudence would have done under like circumstances in a like emergency. An instruction to the effect that if the defendant's servants failed to perform their duty in this respect and negligently moved the car, and the child's death was due to such cause, they are liable, is not erroneous.
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not negligence for a motorman to fail to sound his gong or give other warning upon approaching a pile of lumber lying longitudinally close to the track, between two intersecting cross-streets, preventing him from seeing a child at the end of the pile, so as to render the company liable for injuries to such child who was playing at the end of the pile and suddenly ran immediately in front of or against the car, when there is no evidence that children were in the habit of playing at that particular point or any other circumstances sufficient to give notice to the motorman. See also *Bergen County Tract. Co. v. Heitman*, 61 N. J. L. 682, 40 Atl. 651; *Sample v. Consolidated L. & Ry. Co.*, 50 W. Va. 472, 40 S. E. 597.

A street railway company whose motorman could and should have perceived a child of tender age on or near its tracks under circumstances indicating great danger to the child, but who, by the failure to reasonably use means to prevent injury to the child, does injure it, is liable for such injury. *Nelson v. Crescent City R. Co.*, 49 La. Ann. 491, 21 So. 635. A street railroad company has been held liable where a child three years of age suddenly ran toward the track when the car was ninety feet distant and was struck by the car. *Shenners v. West Side St. Ry. Co.*, 78 Wis. 382, 47 N. W. 622. Where a child ran and fell four feet in front of a horse upon a street car track, the evidence tending to show that the car, although the horse was going at a slow trot, could have been stopped within two feet. *Rosenkranz v. Lindell St. Ry. Co.*, 108 Mo. 9, 18 S. W. 890. Where a child attempted to cross within twenty or thirty feet of the horses, the driver being inside the car. *Levy v. Dry Dock, etc., R. Co.*, 12 N. Y. Supp. 485. Where a child fourteen months old crawled upon the track some distance ahead of the mule which the driver was urging forward into a more rapid trot by slapping it with the lines. *San Antonio St. Ry. Co. v. Caillouette*, 79 Tex. 341. Where a child three years of age came upon the track about thirty feet ahead of the mules, while the driver was inside collecting fares. *Anderson v. Minneapolis St. Ry. Co.*, 42 Minn. 490.

Among other cases where street railway companies have been held liable for the negligence of motormen in failing to avoid collision with children on or near the tracks are: *Fullerton v. Metropolitan St. Ry. Co.*, 63 App. Div. (N. Y.) 1, 71 N. Y. Supp. 326, affirmed, 170 N. Y. 592, 63 N. E. 1116; *Nugent v. Metropolitan St. Ry. Co.*, 17 App. Div. (N. Y.) 582, 45 N. Y.

4. **USE OF FENDERS.**—It appeared that the car causing the injury had no fender. The only evidence introduced was in respect to the absence of such a fender. It was held that such evidence is not of itself sufficient to show negligence on the part of the company. It must be further shown that ordinary care required that a fender should be used; and other evidence should be introduced showing the character of the apparatus, the way in which it operates, and the result of its operation. In view of the absence of such evidence it was further held to be error to permit the plaintiff's counsel to state to the jury that ordinary care required that the defendant should use fenders; and for the court to instruct upon the defendant's duty to equip its cars with safety appliances used by persons of ordinary prudence.

EXCEPTIONS by defendant from verdict for plaintiff. Decided December 31, 1903. Reported 72 N. H. 364, 57 Atl. 218.

The plaintiff's testimony tended to prove the following facts: The intestate was the plaintiff's son, twenty-one months old, thirty-one inches tall, intelligent, and physically strong. He could walk quite well for a child of that age. On the day before the accident the plaintiff moved into a house situated on the northerly side of a street leading to Contocook River park in Concord. The defendants owned a right of way upon the north side of the street, and maintained a street railway upon the right, operated by electricity. There was a path leading from the house across the railway track to the street. The space between the rails at the crossing—three feet in width—was covered by plank about fourteen feet in length. There was also a driveway leading from the house to the crossing, and another path leading from the house to the railway at a point some distance easterly of the crossing. There were three planked crossings in the railway opposite houses easterly of the Carney crossing—one at a distance of 110 feet, another at a distance of 220 feet, and the third at a distance of 486 feet.

Supp. 596; *Rice v. Crescent City R. Co.*, 51 La. Ann. 108, 24 So. 791; *Jones v. United Traction Co.*, 201 Pa. St. 344, 50 Atl. 826; *Hoon v. Beaver Valley Tract. Co.*, 204 Pa. St. 369, 54 Atl. 270.

Negligence of company must be proved.—Notwithstanding the fact that a child is of such an age as not to be chargeable with contributory negligence, the injury itself is not sufficient to render the company liable; a negligent operation of the street car causing the injury must be shown. *Roller v. Sutter St. Ry. Co.*, 66 Cal. 230; *Boland v. Missouri R. Co.*, 36 Mo. 484. Thus, an electric railway company is not liable for the death of a child, *non sui juris*, resulting from his suddenly coming in front of the car when it is too near him to stop it before inflicting the injury. *Culbertson v. Crescent City R. Co.*, 48 La. Ann. 1376, 20 So. 902; *Hirschman v. Dry Dock, etc., R. Co.*, 46 App. Div. (N. Y.) 621, 61 N. Y. Supp. 304; *Adams v. Nassau Elec. R. Co.*, 41 App. Div. (N. Y.) 334, 58 N. Y. Supp. 543; *Callary v. Easton Transit Co.*, 185 Pa. St. 176, 39 Atl. 813; *Hunter v. Consolidated Traction Co.*, 193

There were bushes two or three feet high on the northerly side of the railway and easterly of the Carney crossing, which in the summer partially obstructed the view of the Carney driveway and footpath, and the space between the house and railway, to a person standing on the front platform of a car (where the motorman usually stands) approaching the crossing from the east. A person in that position could see the crossing itself for a distance of 200 to 300 feet before reaching it. About 10 o'clock in the forenoon of August 11, 1901, the intestate, unobserved by the plaintiff and the members of his family, walked out of the house onto the railway track at the crossing, and was struck by one of the defendant's cars while making a regular trip in a westerly direction. No one saw the child before or at the time of the collision, unless the motorman saw him. When the car was some 220 feet easterly of the crossing, it was going at the rate of six or eight miles an hour. The car bell was rung a continuous clang from a point 220 feet from the crossing until the brakes were set. When the car stopped the child laid near the southerly rail three or four feet from the westerly end of the crossing, with his head pinned under the rear motor. He did not appear to be seriously injured, except that he was unconscious. There was little or no blood on his head, and the back of it was not crushed. An attempt was made by the plaintiff and others to remove him, but it was found to be impossible. There was more or less discussion as to how it could be done. The conductor proposed to start the car forward. The plaintiff objected, and suggested that the car be backed, or that a jack be obtained from a mill in the vicinity, or that a nearby telegraph pole be procured, and the car be raised from the child by one of these instruments. The defendants' servants started the car ahead three or four feet, and the child was rolled over the end of the planking and his head was crushed, the blood gushing out of his mouth and ears. He was then taken out, and died in a few minutes. It was about five minutes from the time he was struck until he was extricated. The plaintiff testified on cross-examination that he complained of the child's

Pa. St. 557, 44 Atl. 578; *Pletcher v. Scranton Tract. Co.*, 185 Pa. St. 147, 39 Atl. 837 (in which case it was held that a street railway company is not liable for the death of a boy who ran in front of a car when it was so close upon him that a collision could not have been prevented, even though the car was running at a negligent rate of speed); *Kierzenkowski v. Philadelphia Tract. Co.*, 184 Pa. St. 459, 39 Atl. 220; *Funk v. Electric Tract. Co.*, 175 Pa. St. 559, 34 Atl. 861.

Exercise of best judgment.—In the case of *Bittner v. Crosstown St. R. Co.*, 153 N. Y. 76, 46 N. E. 1044, it was held that if, after a child crossing the track in front of an electric car has been struck down by the car, the motorman, in the exercise of his judgment in the sudden emergency, errs in what he does, as, in reversing the car, the company is not responsible for his error of judgment. Where the occasion demands the exercise of the motorman's best judgment, an error in that respect is not negligence chargeable to the company. *Stabenau v. Atlantic Ave. R. Co.*, 155 N. Y. 511, 50 N. E. 207.

being struck by the car, and of the manner in which the car was started to liberate him; but that the conductor acted honestly, and in his excitement wanted to do what was best to get the child out. The motorman has since died. The jury had a view of the place and the car. The car was twenty-eight feet long over all, and the under side of the sill at the end was twenty-eight and one-half inches above the rail. It had no fender. The defendants' motion for a nonsuit was denied, subject to exception.

The defendants' testimony tended to prove the following facts: The motorman, at the time of the accident and shortly before it, was alone on the front platform, looking ahead and attending to his duties, with nothing to distract his attention from them. He rang the bell at the crossings and the footpath easterly of the Carney crossing and at that crossing. He quickened the ring and set the brake when the front end of the car reached the easterly end of the crossing, stopping the car so quickly as to throw the passengers forward. The car did not move more than half its length after the brake was set. When the car stopped, the rear motor was within six inches of the westerly end of the crossing and held the child's head, the body being on the ground beyond the planking. There was discussion as to the best way to free the child. The conductor thought the best way was to start the car ahead, and did so, about six inches to a foot. One of the defendants' witnesses testified that some gentleman standing there objected. There was no blood, excepting where the child's head laid. The conductor had had two or more years' experience, and had run on that route some sixteen months. He heard no one ask him to get a jack or telegraph pole to raise the car, and thought the plaintiff gave him permission to start the car ahead. He regarded that as the only safe and quick way to release the child. The bottom of the motor was four and three-eighths inches above the planking, and its lower edge was only three inches from the planking. The iron that holds the drawbar in place was seventeen and one-half inches above the planking; and the bunter, which stands out prominently in front of the car, was twenty-nine and one-quarter inches above the planking. The testimony of the physician who examined the child tended to show that the injury to the base of the head could, and probably did, cause death, and was more likely to have been caused by a blow than by pressure. Photographs taken the next day after the accident — one with the camera placed eighty-four feet easterly of the Carney crossing, and the other with the camera placed farther east — were introduced in evidence. The defendants' motion to direct a verdict in their favor was denied, subject to exception.

The plaintiff's counsel, in his closing argument, said that ordinary care required the defendants to use a fender in running cars through this populous neighborhood, and to this remark the defendants excepted.

The following requests by the defendants for instructions were denied, subject to exception: "(1) To entitle the plaintiff to recover, he must show that the defendants' motorman saw the child and realized his danger in season to stop the car before hitting him. (2) The child was not a traveler, but a trespasser; and if the motorman, upon discovering the child, stopped

the car as quickly as he could by the exercise of ordinary care, the verdict should be for the defendants. (3) Neither the defendants nor their servants were required to anticipate that trespassers would be upon their right of way. (4) The defendants were not required to fence their right of way against trespassing children. (5) There is no evidence that the construction of the car was not the universal construction of electric cars."

The following instructions were given, subject to the defendants' exceptions: "(1) It was the duty of the defendants to equip their cars with such safety appliances as men of average prudence would use under the same circumstances. They were not bound to adopt all such devices as are put upon the market; but if they failed to use such safety appliances as reasonably prudent men would use in the same circumstances, and if their failure to use such safety appliances caused or contributed to cause the injury, the defendants are liable. If a person of average prudence would not have used a fender upon a car under the same circumstances, then the defendants are not liable on this ground. (2) It was also the duty of the defendants, by their servants and agents, after the child was knocked down, to exercise ordinary care to avoid injuring him, by moving the car in an improper manner. In removing the child from under the car after it came to a standstill, if the conductor and motorman exercised ordinary care, and did that which a person of average prudence would have done under like circumstances in a like emergency, the defendants are not liable on this ground. If the defendants failed to perform their duty in this respect, and negligently moved the car, and the child's death was due to this cause, they are liable. (3) Something has already been said that you would take into account, in determining whether this motorman and conductor exercised due care, the fact that there were bushes beside the road. You will take into account the existence of the bushes as determining whether they would conceal the child from view; and also you will take into account the existence of the bushes, as to whether the conductor and motorman would be required, as men of ordinary care, to take greater pains to avoid an injury if the place was concealed or covered by something about which they knew."

On the question of damages, the defendants requested the following instruction: "The child being unable to earn, the jury should consider the expense necessary to support and provide for him until he reached an age when he could earn; and also his liability, on account of his tender age, to die. Damages can only be allowed for prospective earning power, less the probable cost of raising him to the time when he could earn." The following instruction was given: "The plaintiff is entitled to recover, if anything, for the reasonable expenses occasioned to the child's estate by the injury. You will consider the age of the child, the probable duration of his life but for the injury, taking into account his liability to die on account of his tender age, and his probable earning capacity in the future; and, taking into account these elements of damages, you will give such damages as you think the plaintiff is entitled to." The defendants excepted to the denial of their request and to the instruction given.

Martin & Howe, for plaintiff.

Albin & Shurtleff and *Mitchell & Foster*, for defendants.

Opinion by CHASE, J.

The intestate being so young as to be incapable of exercising care for his safety, and negligence (if any) of his parents not being imputable to him, there is no question of contributory negligence in the case. *Bisaillon v. Blood*, 64 N. H. 565, 15 Atl. 147; *Warren v. Railway Co.*, 70 N. H. 352, 47 Atl. 735.

The exceptions to the denial of the defendants' motions for a nonsuit and for the direction of a verdict in their favor present the same question, namely, whether in the whole case there is any substantial evidence tending to prove the affirmative of the issues made by the pleadings. *Burnham v. Railroad Co.*, 69 N. H. 280, 282, 45 Atl. 563. Or, expressing the question in another form, assuming the truth of the evidence, and construing it most favorably for the plaintiff, does it conclusively appear therefrom that the defendants were not negligent? Must all fair-minded men arrive at that conclusion upon considering it, or might some arrive at the opposite conclusion? If the latter be the fact, the denial of the motions must be sustained. *Hardy v. Railroad Co.*, 68 N. H. 523, 41 Atl. 179. The controlling fact involved in one feature of this question is the relative positions of the child and the car when the child was in a place of apparent danger of collision with the car and the car was at a place from which the motorman saw the child, or by the exercise of ordinary care could see him. If the child was on the Carney crossing when the car was 200 to 300 feet distant, fair-minded men not merely might find, but should find, that the motorman saw him, or in the exercise of ordinary care ought to have seen him, in season to stop the car before it reached him, and to have realized that he was a child of such tender age as to be incapable of exercising care for his own safety or of being warned of his danger by the ringing of the bell. On the other hand, if the child did not come into the view of the motorman until the front end of the car reached the easterly end of the crossing, and by reason of the presence of bushes or other cause would not have come into view, although the motorman exercised ordinary care in his endeavor to discover the presence

of any one dangerously near the crossing, fair-minded men could not properly find that the defendants were in fault for running against the child. *Gahagan v. Railroad Co.*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426. Between these extremes the relative positions may have been such at times that fair-minded men might differ in their conclusions respecting the conduct of the motorman. The car was approaching the crossing at the rate of six to eight miles an hour, or approximately nine to twelve feet a second. Its position at a given second before the collision can be determined with reasonable certainty. But the evidence relating to the position of the child is very meager and uncertain. No one saw him after he left the house, unless the motorman saw him. The evidence that the car bell was rung a continuous clang while the car was passing over 220 feet of the track is relied upon by the plaintiff to prove that the child was discovered by the motorman in a place of apparent danger when the car was that distance away. If it appeared that the only occasion for ringing the bell was to warn a person discovered in a position of apparent danger of the approach of the car, the evidence would have much weight in support of this proposition. But there were three crossings and a footpath within this space, each of which furnished an occasion for ringing the bell. When it is considered that it took only ten to thirteen seconds to go from one of these crossings to the next, it will be seen that if the bell was rung as a warning of the approach of the car to the crossings it would be rung nearly, if not quite, continuously during the passage over this portion of the track. Just what is meant by a "continuous clang" of the bell is not apparent. If it means that the bell was rung with a rapidity or emphasis that was unusual for signaling the approach to crossings, the evidence would have a tendency to sustain the plaintiff's position. The defendants' evidence that the ringing was accelerated and the brake was suddenly and firmly set when the front end of the car reached the easterly end of the Carney crossing tended to prove that the motorman then discovered a new or additional danger. It cannot be said that reasonable and fair-minded men might not arrive at opposite conclusions as to the cause for this ringing of the bell. The ringing was evidence of such doubtful and equivocal character respecting the discovery of the child that its meaning and bearing were properly submitted to

the jury. *Bartlett v. Hoyt*, 33 N. H. 151; *Hall v. Brown*, 58 N. H. 93; *Tyler v. Railroad Co.*, 68 N. H. 331, 44 Atl. 524. Neither can it be said that fair-minded men might not reasonably arrive at diverse conclusions in reference to the point from which the motorman, if he exercised ordinary care, would first discover the child, and see that he was in apparent danger of colliding with the car. Although the motorman was alone upon the platform, and was looking ahead, apparently attending to his duties, with nothing to distract his attention, he may have fixed his attention upon too limited a portion of the track and its surroundings. It must be assumed that the crossings were put into the track to enable people conveniently to pass from one side of it to the other. The presence of a house near by was conclusive evidence that people might have occasion to use the crossing, even if the house was not occupied. It was liable to be occupied at any time. The record shows that the defendants were conscious of this liability, for they say they rung the bell on approaching this crossing. If the child might be regarded as a trespasser, the defendants would not be relieved by that fact from exercising ordinary care to prevent injuring him after they discovered, or ought to have discovered, his presence there. *Edgerly v. Railroad Co.*, 67 N. H. 312, 36 Atl. 558; *Mitchell v. Railroad Co.*, 68 N. H. 96, 34 Atl. 674; *Buch v. Armory Mfg. Co.*, 69 N. H. 257, 260, 261, 44 Atl. 809, 76 Am. St. Rep. 163; *Wheeler v. Railway Co.*, 76 N. H. 607, 50 Atl. 103, 54 L. R. A. 955. If the motorman had no reason to suppose a child would be trespassing upon the track (*Shea v. Railroad Co.*, 69 N. H. 361, 41 Atl. 774), he might have discovered the child's presence on or dangerously near to the track while looking for persons whom the defendants, by providing the crossing, invited to use it (*Pickett v. Railroad Co.*, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611). The discovery of the child's presence would be the material fact, not the manner or the cause of making the discovery. *Davis v. Railroad Co.*, 70 N. H. 519, 49 Atl. 108. There were bushes two or three feet high on the same side of the track as the house, which at that season of the year partially obstructed the view of the driveway, footpath, and ground between the house and the track to a person on the front end of a car passing along the track. The jury had a view of the place, and saw the nature and extent of this obstruction. The photographs ex-

hibited to the court show that the house was but a short distance from the track. A considerable portion of the surface of the driveway between the house and the crossing, and nearly all of the seven steps leading from the ground to the piazza of the house, can be seen in one of the pictures; while in the other, no portion of the driveway can be seen, and only the two upper steps and a portion of the third, by reason of the bushes. The facility for seeing objects in the driveway, footpath, and adjoining spaces between the house and the track, from the front platform of a car passing over the track, varies with the position of the car. It is enough for the present purpose to say that it does not conclusively appear from the record and the pictures that reasonable and impartial men might not find that the motorman would have discovered the presence of the child in a position of apparent danger in season to have stopped the car before reaching the child, if he had exercised ordinary care in looking out for persons at the crossing. This is especially true of men who have been upon the ground and have seen the objects upon it, as the motorman saw them.

A further question relates to the conduct of the conductor in moving the car to release the child from his position after the accident. The plaintiff's testimony tended to prove that the conductor acted honestly, and apparently wanted to do what was best to get the child out. The defendants argue from this that the conductor acted according to his best judgment, and say that, if he did so, being called upon to act in an emergency in which the life of a human being was in peril, his principals are not liable as matter of law, though his judgment was erroneous. The question of the competency of the testimony was not raised, and has not been considered. If competent, the question what inference should be drawn from it — whether that the plaintiff acted according to his best judgment, or some other inference — should be submitted to the jury. Assuming that the jury must find from it that the conductor acted according to his best judgment, what would be the effect of the finding upon the defendants' liability? Negligence is the want of ordinary care, or such care as persons of average prudence would exercise under the same circumstances. "A mere error of judgment is not necessarily negligence." *Folsom v. Railroad Co.*, 68 N. H. 454, 460, 38 Atl. 209. Men of average prudence sometimes err in judgment. On the other hand,

the mere exercise of one's best judgment is not necessarily ordinary care. Men of average prudence sometimes arrive at erroneous conclusions from a heedless or careless consideration of the subject before them, or from want of ordinary care in other respects. If a person is suddenly called upon to act in an emergency involving the safety of the life or limb of a human being, this fact must be taken into account in determining the quality of the act. The excitement incident to such situation naturally affects the judgment of a prudent man, and has a tendency to prevent it from doing its best work. But this circumstance does not change the question as to the quality of the act in respect to carefulness from a question of fact to one of law. If the circumstance causes an error of judgment, and, as a consequence, an injurious act, the act is not necessarily negligent. It might be found that men of average prudence would act in the same way under the same circumstances. Conversely, the act is not necessarily prudent because prompted by the best judgment of the actor. It might be found that men of average prudence would not so act under the same circumstances. Whether it is the one or the other is purely a question of fact to be determined by the jury "in view of their experience in the affairs of life — their knowledge of the motives that govern human action, and of the conduct of reasonably prudent men in similar exigencies." *Folsom v. Railroad Co.*, 68 N. H. 454, 460, 38 Atl. 209; *Warren v. Railway Co.*, 70 N. H. 352, 47 Atl. 735. "What constitutes negligence in a given exigency is a question for the jury, and not for the court." *Paine v. Railway Co.*, 63 N. H. 623, 3 Atl. 634, 58 N. H. 611, 614, 615.

In *Wynn v. Railroad Co.*, 133 N. Y. 575, 30 N. E. 721, cited by the defendants, the question was whether there was any evidence tending to show a want of skill and care on the part of the driver of the defendants' horse car when the plaintiff (a passenger) was injured; and the court, after pointing out that there was not "a particle of evidence tending even remotely" to prove such fact, use the language relied upon by the defendants in this action: "He [the driver] was confronted with a sudden emergency, and we cannot now say that this action was not the best that could have been performed under the circumstances. Even a failure to exercise the best judgment which the case rendered possible cannot be claimed as evidence of a lack of care

or skill. We do not, however, see any evidence that in fact there was such failure." Bearing in mind that this language was used in the discussion of the question as one of fact, it is not inconsistent with the views above expressed. *Stabenau v. Railroad Co.*, 155 N. Y. 511, 50 N. E. 277, 63 Am. St. Rep. 698, is a similar case. *Bittner v. Railway Co.*, 153 N. Y. 76, 46 N. E. 1044, 60 Am. St. Rep. 588, another case cited by the defendants, falls short of supporting their position. When the case was before the Superior Court it was held — one judge dissenting — that error of judgment on the part of one who negligently injures another cannot be invoked as a defense in his behalf. 12 Misc. Rep. 514, 33 N. Y. Supp. 672. In the Court of Appeals it was held, in substance, that the jury should have been distinctly instructed that if, in what the defendants' motorman did, he used his best judgment, the defendants were not responsible, even if it was an error, and caused the alleged injury. At the same time the court say that, if the jury could believe the testimony of one of the plaintiff's witnesses relative to the movements of the car, they could perhaps find that the motorman was negligent. But how would it be if the motorman, acting under great excitement, acted according to his best judgment, the electric power governed by his acts operating more promptly and to a greater extent than he anticipated? There seems to be inconsistency in the opinion. The decision relating to the instruction that should have been given to the jury, if it is correctly understood, cannot be followed in this jurisdiction. It conflicts with principles of law firmly established, to which reference has been made. In any event, the question whether the motorman exercised his best judgment was regarded as one of fact for the jury, and the decision to this extent supports the rulings in this case at the trial term. A consideration of the later case of *Lewis v. Railroad Co.*, 162 N. Y. 52, 56 N. E. 548, raises a doubt whether the decision in the Bittner case is correctly understood. In the Lewis case the jury were instructed that if they found that the engineer of the defendants' train, after seeing the horses attached to the coach in which the plaintiff was riding, omitted to do any act which might have prevented the collision or lessened the plaintiff's danger, the defendants were guilty of negligence. This was held to be erroneous. The court, after saying that the charge was

in direct conflict with the principles of the Wynn, Stabenau, and Bittner cases, proceed as follows (page 62, 162 N. Y., and page 551, 56 N. E.): "The short period of time in which he [the engineer] was obliged to act, the impending danger to his train, to himself, to his passengers, and to others, with the consequent excitement attending such a situation, the various acts required to stop or lessen the speed of the train, and all the other circumstances surrounding him at the time, should have been presented to the jury, and considered by it, before it could properly find the defendant negligent by reason of the acts of its engineer." The question for determination upon a consideration of such facts in a case in this State would be, not whether the engineer acted according to his best judgment under the circumstances, but whether he acted as a man of average prudence would act. *Folsom v. Railroad Co.*, 68 N. H. 454, 38 Atl. 209. It would certainly be a new departure to hold that the jury should be instructed that, if the engineer acted according to his best judgment, the defendants were not in fault. *Paine v. Railway Co.*, 58 N. H. 611, 614, 615; *Huntress v. Railroad Co.*, 66 N. H. 185, 190, 34 Atl. 154, 49 Am. St. Rep. 600; *Davis v. Railroad Co.*, 68 N. H. 247, 250, 44 Atl. 388; *O'Leary v. Railway Co.*, 177 Mass. 187, 58 N. E. 585; *Whitman v. Railway Co.*, 181 Mass. 138, 63 N. E. 334. There being no contributory negligence on the part of the plaintiff's intestate, *Rhing v. Railroad Co.*, 53 Hun, 321, 6 N. Y. Supp. 641, and *Rider v. Railway Co.*, 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125, are not in point.

The question upon this branch of the case raised by the defendants' exceptions, therefore, is not whether it conclusively appears that the conductor acted according to his best judgment, but whether it thus appears that he acted as men of average prudence would act under the same circumstances. The accident to the child had happened, and the car had been stopped. All the agencies involved in bringing him under the car had ceased, and a new situation existed. See *Weitzman v. Railway Co.*, 33 App. Div. 585, 53 N. Y. Supp. 905. The question then was, what should be done to release the child from his perilous position? The situation required the formation and execution of plans in the briefest possible space of time. There was a discussion among

those present as to the plan that should be adopted. The evidence is conflicting regarding this matter. The conductor thought the best way was to move the car ahead. The plaintiff's evidence was that he objected to this course, and suggested that the car be lifted from the child by means of a jack or lever. The defendants' evidence was that the conductor did not hear the objection and suggestion, but acted under the impression that the plaintiff consented to the plan proposed. The fact involved in this conflict of testimony manifestly has a bearing upon the question of ordinary care, and it was the province of the jury to find the fact from the conflicting testimony. The conductor's plan seemed to contemplate the moving of the child's body forward from the planking of the crossing to the ground by means of the motion of the car, a portion of which touched the child, and thereby to enlarge the space underneath the car. It is impossible to suppose that he thought the rear motor, the lower edge of which was only three inches above the planking, would pass over the child's head and body without injuring them. It is equally impossible to suppose that all fair-minded and reasonable men would find that men of average prudence would have adopted this plan under the circumstances. The question was peculiarly one of fact requiring determination by a jury. The defendants' motions were properly denied, so far as they related to each branch of the question of negligence presented by the record.

It will be seen from the foregoing views that the court are of opinion that there was evidence in the case which warranted the instructions to the jury numbered 2 and 3 in the record. No error of law has been discovered in these instructions, nor in the denial of the defendants' requests for instruction, except the one relating to the absence of a fender.

In the closing argument the plaintiff's counsel said that ordinary care required that the defendants should use fenders upon their cars when running through such populous neighborhoods as that where the accident occurred. The defendants excepted to this, and also to the instruction of the court to the jury (numbered 1 in the record) upon the subject of safety appliances and fenders. The argument and instruction would be unobjectionable if there was evidence in the case to warrant them. It appeared from the

view that the car had no fender, and this was the only evidence on the subject. The character, mode of operation, utility, and extent of use of safety appliances and fenders for street cars operated by electric power are not matters of common knowledge. It cannot be presumed that the jury had knowledge of these matters. The burden was upon the plaintiff to prove that the absence of a fender constituted negligence. This burden was not sustained by simply proving that the car had no fender. It was necessary to prove further that ordinary care required that there should be a fender. This would involve, among other things, a description of the apparatus, the way in which it operates, the result of its operation, etc. Even if expert testimony were necessary (which is doubtful), that circumstance does not avoid the necessity of proof, as the plaintiff seems to argue. The defendants were not called upon to antagonize the allegation by proof until some evidence was introduced in support of it. It is difficult to understand how the defendants could be benefited, as the plaintiff argues, by the omission to prove his allegation, when the question was presented to the jury by him in the closing argument, and by the court in the charge, as if the plaintiff had laid before the jury sufficient evidence to sustain a verdict in his favor on the point if they credited the evidence. On the other hand, it appears that such course must be prejudicial to the defendants by leading the jury to understand that the mere absence of a fender was sufficient evidence of negligence. The exceptions under consideration are sustained, and, as a consequence, the verdict must be set aside.

This disposes of the case, but it seems advisable to consider one aspect of the defendants' exception to the charge of the court relating to damages, as the question will necessarily arise upon a new trial. The cause of action for a tort of this kind survives the decease of the injured party, subject to certain modifications and limitations with respect to damages. Pub. Stats. 1901, chap. 191, § 8. The remedy provided by the earlier statutes on the subject was an indictment upon which the wrongdoer, if found guilty, was fined; the fine going to the deceased party's widow or heirs-at-law. Laws 1850, p. 928, chap. 953, § 7. In 1879 a civil form of action to recover "damages for the injury" was sub-

stituted for the criminal form. Laws 1879, p. 353, chap. 35, § 1. By Act 1887, p. 454, chap. 71, the damages recoverable in the action were enlarged, and the elements to be considered in assessing them were specified to some extent. They were "damages for the injury to the person and estate" of the deceased party by the "wrongful act or neglect and consequent death;" and in assessing them "the mental and physical pain of the injured person, the expense occasioned to him in his life and to his estate upon his decease, his age, and his probable duration of life and earning capacity but for said wrongful act or neglect," were to be considered (§ 1). The present statute specifies the same elements of damage, in slightly different form, but without any change in substance. Pub. Stats. 1901, chap. 191, § 12. So it appears that the damages are to be assessed on the basis of the loss suffered by the deceased party and his estate; not the loss suffered by his surviving relatives, although the damages, when recovered, go to them. *Clark v. Manchester*, 62 N. H. 577; *Warren v. Railway Co.*, 70 N. H. 352, 362, 47 Atl. 735. The "earning capacity" of the deceased, or, as it is expressed in the present statute, "his capacity to earn money," must be understood to mean capacity to earn money for his estate. When, as in this case, the deceased is an infant of tender years, he has no present capacity for earning money for himself or any one else; but the capacity referred to is not limited to the time of death; it is the capacity that would exist during life but for the injury. Besides, the physical incapacity of an infant, he is under a legal incapacity to earn money for himself or his estate during his minority; for, unless he has been emancipated, his earnings belong to his father, if living, or, in case of the father's death, to the mother — a right arising from the duty of the parent to support and educate the child. *Jenness v. Emerson*, 15 N. H. 486; *Hammond v. Corbett*, 50 N. H. 501, 9 Am. Rep. 288. If the child were emancipated, he would need to use his earnings to pay the expenses of his support and education, and ordinarily there would be little, if any, balance left. While the jury should not have been instructed, as requested by the defendants, that damages can only be allowed for prospective earning power, less the probable cost of raising the intestate to the time when he could earn money, they should

have been instructed, and, if the defendants' request had been to that effect, probably would have been instructed, in reference to the legal incapacity of the intestate to earn money for his estate during minority.

The exception relating to argument and charge concerning the absence of a fender sustained; other exceptions overruled.

All concurred.

Cordner v. Boston & Maine Railroad Co.

(New Hampshire — Supreme Court.)

ILLEGAL ARREST BY STREET CAR CONDUCTOR.¹—A street railway company is not liable for the arrest and imprisonment of a person by a conductor acting as a special police officer under a statute providing for the appointment of conductors as railroad policemen (Pub. Stats. 1901, chap. 160, § 32), unless he was directed to make the arrest by the company, or unless he was engaged in its business, and acting within the scope of his authority at the time.

EXCEPTIONS by plaintiff from judgment for defendant. Decided February 2, 1904. Reported 72 N. H. 413, 57 Atl. 234.

Trespass, for assault and false imprisonment. Upon a trial by jury at the October term, 1902, of the Superior Court, Young, J., presiding, a nonsuit was ordered, subject to the plaintiff's exception.

The testimony tended to prove the following facts. The defendants operate an electric street railway between Portsmouth and Exeter. One Hoyt was a conductor upon this railway. A petition in the name of the defendants, signed, "Boston & Maine Railroad, by Arthur F. Howard, Assistant Superintendent of the Portsmouth Electric Railway," was presented to the mayor and aldermen of the city of Portsmouth on August 1, 1901, for the appointment of certain of their employees upon the street railway—Hoyt among them—as special police officers, to act as railroad police, for the purposes and with the powers prescribed by chapter 160 of the Public Statutes. The petition was laid upon the table by the mayor and aldermen, and was not further acted upon. The clerk of the defendant corporation never filed with the clerk of the city a copy of any appointment of Hoyt as such officer.

1. As to liability of a street railway company for the unlawful arrest of a passenger by an employee, see note to *Farrell v. St. Louis Transit Co.*, *ante*, p. 592.

Hoyt was sworn by the city clerk under an arrangement made by the assistant superintendent of the street railway for swearing as special police officers all its conductors who were citizens of Portsmouth. The railroad furnished Hoyt a badge, inscribed "Portsmouth Electric Railway, Special Police, No. 12." On September 6, 1901, Hoyt worked for the defendants as conductor between the hours of 7 and 8 o'clock in the morning, from half-past 12 to half-past 2 in the afternoon, and from half-past 6 to half-past 11 in the evening. He was not on duty or subject to the defendants' orders during the remainder of the day. About fifteen minutes after 8 o'clock in the forenoon, while he was paying to the defendants' ticket agent, through the window of the ticket office in their station at Portsmouth, his collections of the day previous, he missed two silver dollars which he had placed on the shelf of the window; and he suspected the plaintiff, who approached the window to make an inquiry, of taking them. He immediately reported the loss to a clerk of the assistant superintendent of the street railway, and to the city marshal of Portsmouth. He went in search of the plaintiff for the purpose of recovering the money, and between 9 and 10 o'clock saw him upon an electric car destined to Exeter, and got upon the car and told him of his suspicion. The plaintiff denying that he had taken the money, Hoyt telephoned the clerk above mentioned that he had found the plaintiff, and asked the clerk to inquire of the city marshal if he had authority to bring the plaintiff back to Portsmouth. The clerk communicated with the marshal, and, by his instruction, directed Hoyt to bring the plaintiff to his office. The plaintiff objecting, Hoyt exhibited his badge and told the plaintiff he would be obliged to return, whereupon he accompanied Hoyt to the marshal's office. After a brief conference with the marshal, the plaintiff was allowed to go. The money has not been recovered, and its loss fell upon Hoyt. The plaintiff testified that he did not take it. The action was based upon Hoyt's acts.

Ernest L. Guptill, for plaintiff.

John S. H. Frink and *John W. Kelley*, for defendants.

Opinion by CHASE, J.

The mere fact that Hoyt was the defendants' servant is not sufficient to make the defendants answerable for his arrest of the plaintiff. They are not liable unless they directed him to make the arrest, or unless in so doing he was engaged in their business, and acting within the scope of his employment as their servant, or unless they have ratified his act. *Wilson v. Peverly*, 2 N. H. 548; *Grimes v. Keene*, 52 N. H. 330; *Andrews v. Green*, 62 N. H. 436; *Searle v. Parke*, 68 N. H. 311, 34 Atl. 744; *Rowell v. Rail-*

road Co., 68 N. H. 358, 44 Atl. 488; *Turley v. Railroad Co.*, 70 N. H. 348, 47 Atl. 261. The first of these contingencies may be dismissed with the remark that it appears that he acted under the direction of the city marshal, instead of the defendants. The record contains no fact tending to show that the defendants have ratified the arrest as an act done in their behalf.

The question remaining is whether impartial and fair-minded men, upon a consideration of the facts, might reasonably find that Hoyt, in making the arrest, was engaged in the defendants' business, and acting within the scope of his employment. His particular employment was that of conductor upon the defendants' street railway, but he was not on duty at the time of the arrest—in fact was not subject to the defendants' orders. The arrest was not made upon view of the offense, but some time after its commission. Who the offender was, was matter of suspicion, merely. Though the money alleged to have been stolen belonged to the defendants, the loss fell upon Hoyt. The defendants had no interest to have the arrest made, other than such as Hoyt or any member of the community had. It cannot be assumed that, by the employment of Hoyt as conductor, it was understood that he should arrest a suspected person in behalf of his employers under such circumstances. It would be no more within the scope of his service to do this than it would be to bring an action of trover for the missing coins.

In addition to his employment as conductor, it appears that an attempt was made by the assistant superintendent of the street railway to have him, with other employees, appointed railroad police officer, under the provisions of section 29, chapter 160, Pub. Stats. 1901. Whether the attempt was authorized by the defendant corporation, does not appear. It failed from some cause; but, notwithstanding the failure, Hoyt was sworn as police officer, under an arrangement made for the purpose by the assistant superintendent, and was furnished with a badge of office. Assuming that this constituted him an officer *de facto* (*Jewell v. Gilbert*, 64 N. H. 13, 5 Atl. 80, 10 Am. St. Rep. 357), or if not, that the defendants are estopped to deny that he was such officer, and was appointed upon their petition, how does the fact affect the scope of his service for the defendants? Manifestly, it could not modify

or enlarge the ordinary service of the employee, beyond the inclusion within the service of a performance of the duties imposed by law upon railroad police officers; and it is doubtful if it would have effect even to that extent. *Healey v. Lothrop*, 171 Mass. 263, 50 N. E. 540; *Hardy v. Railroad Co.*, 58 Ill. App. 278. These duties are set forth in the statute in the following terms: "Railroad police officers may preserve order within and about the premises and upon the cars of the corporation upon whose petition they were appointed; they may arrest without a warrant all idle, intoxicated, or disorderly persons frequenting such premises or cars, and obstructing or annoying, by their presence or conduct, the traveling public using the same, and all persons committing thereon any offense known to the laws of the State, and may take the persons so arrested to the nearest police station, or other place of lawful detention in the county where the offense was committed." Pub. Stats. 1901, chap. 160, § 32. The object of the statute is the preservation of order upon and about the premises and upon the cars of railroad corporations. The duties prescribed and the powers conferred are confined to those places, and relate solely to offenses there committed. The object is to be attained by taking notice of offenses immediately upon their commission. The employees of the corporation are clothed with the powers of police officers because they are likely to be present at the time police services are needed. The provision that the arrest may be made without warrant shows that the circumstances in view of the lawmakers were those which will justify such an arrest. In short, the statute confers authority upon railroad police officers to arrest offenders upon the premises and cars of their corporations, upon view of offenses there committed. Even if Hoyt must be regarded as a railroad police officer, so far as the defendants are concerned, his arrest of the plaintiff was an act that was outside the duties of the office. The statute did not make it his duty, nor authorize him, to arrest without a warrant a person for an offense which the person was suspected of having committed at an earlier time, though it was committed upon the defendants' premises, and the suspected offender was at the time of the arrest a passenger upon one of their cars. Such cases are governed by the provisions of law relating to offenses generally,

rather than by the provisions made for the special protection of the traveling public. There is nothing in the record tending to show that it was within the scope of Hoyt's service for the defendants to make the arrest under consideration.

Exception overruled.

YOUNG, J., did not sit. The others concurred.

State v. Young.

(New Jersey — Supreme Court.)

1. **CRIMINAL LIABILITY OF DIRECTORS FOR DEATH OF PASSENGER.**—To hold the directors or officers of a street railway company criminally liable for the death of a passenger, it must appear that they have been guilty of gross negligence either in the performance of, or in the failure to perform, some specific act which was rendered necessary in the performance of their duties.
2. **DERAILING SWITCH AT RAILROAD CROSSING.**—In view of the difference of opinion existing among railroad men as to whether or not the presence of derailing switches at a railroad crossing adds to the safety of the crossing it cannot be said to be gross negligence for the officers or directors of the company to omit to provide such derailing switch.
3. **INTERFERENCE WITH MOTORMAN PREVENTING THE PERFORMANCE OF HIS DUTY; CROWDED FRONT PLATFORM.**—Admitting that the defendants had knowledge of the fact that children were permitted to ride on the front platform, the circumstances of the case did not compel the conclusion that the presence of such children upon the platform interfered with the motorman in the operation of his car, and thereby added danger to the lives of those who were riding thereon.
4. **CONSIDERATION OF ENTIRE SYSTEM OF OPERATION AND CONSTRUCTION.**—Where the entire system of construction and operation of a street railroad was sufficiently safe in its nature to justify the directors and officers of the company in supposing that additional precautions were not necessary, such officers and directors cannot be held guilty of such gross negligence as to make them responsible for the death of a passenger. Where it appears from the evidence that if the system devised and inaugurated by the defendants and the rules and regulations promulgated by them had been observed by the persons in charge of the car, the accident would not have occurred, then the defendants cannot be held criminally liable for the failure to perform their duties.

The defendant's counsel at the end of a trial of a criminal case moved the court to direct a verdict of acquittal. The motion was granted and the following oral opinions were delivered. Trial had September 3, 1903. Reported 69 N. J. L. 592, 56 Atl. 471.

Chandler W. Riker, Prosecutor, *Louis Hood*, Asst. Prosecutor, *Francis Child*, and *Edmund Wilson*, for the State.

Richard V. Lindabury, *George T. Werts*, *Joseph Coult*, and *James B. Vredenburg*, for defendants.

Oral opinion by GUMMERE, C. J.

At the conclusion of the afternoon session there was a motion made on behalf of the defendants to instruct the jury to render a verdict in their favor, on the ground that the evidence submitted by the State afforded no ground to support a conviction. The making of the application seems to the court to be a submission of the case by the defendants on the evidence of the State, and the question, therefore, is whether, on the evidence upon which the case is rested, there is anything which will support the conclusion that these defendants, or any of them, have been so grossly negligent in the performance of the duty which they owed to the children who were passengers on this car as to render them criminally responsible.

That this crossing is a place of especial danger cannot be controverted. That human ingenuity could not render it absolutely safe is manifest. But notwithstanding that fact, neither the corporation, whose agents these defendants are, nor the defendants themselves, are guilty of any criminal act, or even civilly responsible for the construction of their railroad at this place. I say that for this reason: The Legislature has authorized the North Jersey Street Railway Company, or its predecessor, to construct and operate a trolley road along the surface of Clifton avenue, down that incline, and across the tracks of the steam railroad company at grade. And being authorized by the Legislature, the act is a legal one. No responsibility, either criminal or civil, rests upon a man who does a legal act, unless he does it in a negligent way. And so the State very properly concedes, as I understand it, that the only respon-

sibility which can attach is such as arises from a negligent performance of duty, either in the method of construction of that road in that dangerous locality, on the grade of the street, or in the system of its operation. The question of the criminal responsibility of the individual officers or agents of the company is a much narrower one than that of the civil responsibility of the corporation. It must appear that each one of these directors or officers, to be responsible criminally, has been guilty of gross negligence, either in the doing of, or in the omission to do, some specific act, which was rendered necessary in the performance of his duty to the children who rode on that car.

It is said by the State that the negligence has been shown, first, in the improper construction of the road at this point; and, second, in the improper operation of the road. The road is constructed on the surface of the street without a derailing switch, and that omission is said to be an act of negligence on the part of these defendants so gross as to make them criminally responsible for this accident. The allegation assumes that the absence of the switch produced the accident. It is said, too, that gross negligence is shown by the fact that these defendants permitted the front platform of this car to be crowded. That assumes that the permission to ride on the front platform, given to the members of the public who did so, or given to these children who did so on this occasion, contributed to produce the accident.

The undisputed facts, as submitted by the State, show that at the crossing of trolley roads by steam railroads it is not the universal practice to put in what have been called here "derailing switches," and that, so far as the case discloses, not more than perhaps 10 per cent. of all the crossings in this country are so protected. That suggests, at least, the idea that there must be a great difference of opinion among men who operate these trolley roads at such points as to the advisability, the wisdom, of such a method of protection, as to whether or not it really does add to the safety of the crossing, or whether it does not, in fact, make it more, rather than less, dangerous. I say that raises a question, and, where a question is presented of that kind, there being reasons for and against the adoption of a scheme, it does not follow that, because one method is discarded, rather than

adopted, the act is a negligent one. Whether or not a derailing switch is a necessary precaution, the omission of which suggests, or rather demonstrates, gross negligence on the part of those who omit to put it in, cannot be decided without considering also the question of the operation of the road as it is constructed. This road was constructed, it is true, without a derailing switch at the point or near the point of crossing. But for the protection of passengers who rode on its cars, this company and these defendants, so far as they are responsible for the operation of the system, adopted a set of rules which were to be observed by their employees at points like Clifton avenue crossing. Those rules required, at this point, the motorman to stop his car at Orange street, at the head of the grade. They required him, when he afterward started his car, to keep it continually under control until he reached a point, as I recall it, about thirty feet from the steam railroad crossing. They required him there to stop his car. And the fact that during a period of at least two years preceding this accident no car, so far as any witness has been called to show, ever came down that grade not under control, or ever failed to stop at the point indicated, shows that, under ordinary conditions, those rules, if observed, made the operation of that car down that hill, without the presence of a derailing switch, safe.

In order to provide for unusual contingencies, such as a bad track, or slippery rail, specific instructions with relation to the management of the brake under those conditions were supplied to the motormen, and they were required to observe them; and, as a further precaution, sand was required to be supplied to all of the cars, under the rules, for the still further protection of people riding on the cars, to be used when the brake failed to stop the car on account of the slippery condition of the rail. And it is clear from the testimony in this case that, if sand had been used in accordance with the rules, and if the brakes had been operated in the way required by the rules, this accident would not have happened.

It is said in answer to that, by the prosecutor, that the inability to use the brakes in the way required by the rules was due to the fact that the car was so crowded on the front platform as to

interfere with the motorman. The testimony, as I understand it — and I have examined it carefully — does not support that contention. From the time when passengers appear first to have been permitted to ride on the front platform of these cars, going to and from the High School, in September, 1902, down to the very time of this accident, there never were so many people admitted on the front platform of the car as to interfere at all with the motorman in the operation of his brakes. And so, if it be conceded — and I do concede it for the purpose of disposing of this application, although I doubt whether it can be legally conceded — that these defendants are chargeable with the knowledge of the fact that children were permitted to ride on the front platform (for no evidence shows that it had been brought to their knowledge), there was nothing in that condition of affairs to justify them in the conclusion that the presence of these children on the platform in numbers not sufficient to interfere with the motorman in the operation of his car added any danger to the lives or limbs of those who were riding thereon. I have already said that if sand had been used by the motorman, in accordance with his instructions, this car could have been stopped.

There was an additional protection afforded by the rules which I omitted to state, and that was that, after the car had been brought to a stop at a point thirty feet from the crossing, the conductor was required to go forward onto the middle of the crossing, and observe whether or not a train was approaching, and the motorman was forbidden to move his car until he received information from the conductor that the way was clear and the crossing was safe. There was still an additional precaution which furnished the motorman information, not, however, furnished by the trolley company, but by the steam railroad company; and that was the presence of a flagman at this crossing, whose duty it was to lower the gates which were provided by the steam railroad company when a steam railroad train was approaching in either direction. All of these things were required to be done in order to aid the motorman in the performance of his duty. Taking the system of construction and the system of operation together, if they did not furnish the safest

method which could possibly have been devised for the protection of passengers on the trolley cars, they certainly did furnish so safe a method as to justify these directors and officers in supposing that additional precautions were not necessary. It was a question for them to determine whether the putting in of a derauling switch would be an additional safeguard. And, because they reached the conclusion that it was not required, instead of the opposite conclusion, it cannot be said that they were guilty of such gross negligence in the performance of duty as to render them criminally responsible.

It seems to me, therefore, that, as this case is presented, it cannot be said that any one of the defendants has failed in the performance of any duty which the law imposes upon him with relation to the care of the passengers who were riding upon this car at that time; that manifestly there is nothing in the testimony which shows such gross negligence on the part of any one of them as to render him criminally responsible for the death of this poor child, whose life was lost in the accident that occurred on the 19th day of February last. I, therefore, conceive it to be my duty to instruct this jury to render a verdict in favor of the defendants in this case.

Justice Van Syckel and Justice Dixon having very kindly consented to sit with me and aid me in the trial of this case with their advice, I would be very glad if they would express the views which they have reached with relation to this case. I will ask Justice Van Syckel, who is the senior member, to speak first.

Opinion by VAN SYCKEL, J.

The questions which were discussed before the adjournment of the court yesterday were purely legal questions, and were addressed to the court alone, not to the jury. The responsibility for the proper decision of those questions rests alone upon the court, and not upon the jury. No duty, so far as those questions are concerned, rests upon the jury; no responsibility rests upon the jury, except to obey the instruction of the court; and what the chief justice has so clearly said, and what I shall say, is not for the purpose of submitting to the jury the consideration of any question which is now presented.

The case has not reached, as yet, that stage in which the jury has any duty to perform, other than that of accepting from the court the law, which, I am pleased to say, in this State, our juries always do; otherwise justice could never be properly administered.

The company, as the chief justice has well stated, had a right to lay its track upon the surface of the street, across the Delaware, Lackawanna & Western railroad at grade. It is a right which the law conferred upon the company, and, in doing that act in a proper manner, they were guilty of no illegal conduct, although a dangerous situation was presented, in fact. It is impossible to eliminate all danger from a railroad crossing, where one railroad crosses another, or even where a single railroad is run. There is always some element of danger. But it was the duty of this company, and of those who controlled the company — the duty of those who are here upon trial — to use reasonable and due care to prevent injury to life. They must not only construct that road in a proper manner, but they must run it in a proper manner; and the question is whether they have failed in the performance of any duty in this respect which renders them, or any of them, criminally liable. Now, I understand the rule of law to be that, if these defendants have failed in the discharge of a plain duty — a plain duty, gentlemen, you must understand — which any man of reasonable prudence would see could not be omitted without endangering the lives of those whose safety was committed to their care, then they committed a criminal act. But our law is so humane that no man will be adjudged to be a criminal who merely errs in judgment in a matter about which there is room for some honest difference of opinion. Now apply that rule to the grounds upon which the State has placed its case. Has there been, on the part of any one of these defendants, a failure to perform a plain duty, which he could not have failed to see endangered the lives of passengers, or was it an error in judgment upon a subject about which prudent men would not all agree? For such an error of judgment there is no criminal liability.

Three grounds are stated. First, they say they crowded that front platform. Well, the mere fact that a number of passengers

were upon that front platform was not the approximate cause of this accident, so far as the evidence shows, and we must be guided alone by the evidence which has been produced. We know nothing outside of it. Now, if that car had almost passed over the track, the persons in the rear of the car would have been killed or injured. If the car had passed halfway over the track, passengers in the center, or probably all the persons inside the car, would have been killed or injured. So you see, gentlemen, that was not the cause of the sad death of this young woman. The importance of that situation is this: That by crowding the front platform the motorman might be obstructed in the discharge of a duty which was necessary for the safety of passengers. And if the evidence had been that this motorman was on that occasion interfered with in that way, so that he could not use the means of stopping the car and preventing the accident, and these defendants could have been charged with the knowledge that that state of things existed, or was likely to exist, a different case would be presented. But what evidence is there on the part of the State that the motorman was obstructed in the use of the means by which he could have stopped that car? One witness says he was pushed off — the only witness who testifies to that fact — he was pushed off the car by those who were inside on the front platform. But he does not say that that interfered with the motorman. So I think that must be put out of view in the case.

The second ground on which the State puts its case is the want of sand, or the failure to put sand on the track. Well, if these defendants had refused to furnish sand to the motorman after he had applied for it, or refused to furnish it to those whose duty it was to apply to the company for it, that would be a ground for the consideration of the jury. But we cannot presume any negligent act on the part of the defendants. It must be proven. When a man is charged with a high crime, he may stand perfectly secure until his guilt is proven. The minute his guilt is proven, then it is time for him to answer and make his defense. Until then he is shielded by the presumption of innocence. This company provided the most rigid and careful rule, which has been read to you, for the safe conduct of this road. It provided men whose duty it was to see that sand was in a proper place for the motor-

man. It made it the duty of the motorman to see that there was sand on his car, forbidding him to use it excepting in case of emergency — just such a case as this was — so that he could always have it. The failure either to use the sand upon the track, or have it there, has not been traced to either one of these defendants. Therefore we lay that out of the case. No responsibility for that neglect on the part of any one of these defendants has been shown.

Then we come to the want of the derailing switch. One witness gave 250 instances of other railroads where there are crossings on which there were no derailing switches, except, I think, a very few — a very small percentage — less than 10 per cent., I think. Now, it is charged that this derailing system was in common use, known to these defendants to be a necessary precaution against danger, and that they failed to take it; but the State has entirely failed to make out that situation. It is in use in a very few instances, and I think it may be with truth said that in those instances, taking the evidence here, which is all we have upon the subject, that that was simply experimental — some companies tried it in a very few cases, and failed to try it in a great majority of instances on the road; and, at all events, it was a fair matter to be considered — a matter of judgment — whether it did add anything to the safety of travel. But there is another view of it to be taken. It was a clear duty of this company to provide some reasonable means on such a descent as that upon Clifton avenue to prevent accidents. They must provide some reasonably safe means — some means which men of reasonable judgment and caution would commend as being sufficient for the purpose. But if they provided one means that was sufficient for that purpose, and that is all that was necessary, they were not bound to provide more than one — one reasonably safe means. The law does not require absolute immunity from danger to be provided in order to avoid criminal liability. Now, what is the situation here, gentlemen? They have run the road with the means of safety provided by the defendants and by this company for over two years, and, so far as appears from the evidence, there was not a single accident, not a failure in any one instance to preserve the safety of those passengers in going down that hill, across

that railroad; and I think every man who has heard this evidence must concur in saying that if there had been sand on that track, or if sand was on the car, and the motorman had used it, this accident would not have happened. Therefore, we have this situation, not only that the company and these defendants, so far as their duties were concerned, had provided a plan which worked safely without an accident for over two years, but that, on that very morning when that accident happened, if the means which they had furnished for their employees had been used, the accident would not have happened. Now, we think it is manifest that it cannot be said that these defendants failed in the performance of a plain duty after having furnished means which, if applied by their subordinates, would have prevented the accident. Responsibility for failure to use those means does not fall upon these defendants.

For these reasons, gentlemen, which I have stated at more length than I intended to, because the chief justice has so fully stated the grounds upon which the motion is granted, I join in directing you to find a verdict for the defendants, and saying to you that it is the law of the land that you must obey these instructions.

The CHIEF JUSTICE. Justice Dixon will now state his views.

Opinion by DIXON, J.

I concur in the result to which my brothers have come, and substantially in the grounds that have been stated as the basis of that result.

The charge made against these defendants is one of manslaughter — involuntary manslaughter — and it involves these propositions: That Ernestina Miller came to her death by reason of some gross neglect on the part of these defendants, or some of them, with regard to a plain duty which rested upon them under the law. Of course, therefore, the State must make out, first, that she came to her death; then, that there was some plain duty upon the defendants, or some of them; and that that duty had been grossly neglected, and that out of that neglect her death had resulted. If the State produces any evidence tending to show all of those facts, the matter, under our law, is to be

decided by the jury, under such instructions as the court may give them touching other general principles. But if the State fails to offer any evidence tending to prove any one of those facts, why, then, there is a question which must first be decided by the judges, and their decision, if in favor of the defendants, ends the case.

That Ernestina Miller met her death is a conceded circumstance. The next fact to be sought for is a plain duty—evidence of a plain duty resting upon these defendants, or some of them, the performance of which would have prevented her death. These defendants do not all stand in the same position before the court. Some of them stand as concerned only with the operation of this trolley road. Others of them stand as concerned with the scheme or system under which the operation was to take place. And the suggestion on the part of the State is that, with regard to each of these classes of defendants, there was a plain duty which was grossly neglected.

The first duty suggested is the duty of preparing a system for the operation of this trolley road, which would prevent, if properly carried on, the occurrence of such accidents as resulted in the death of Ernestina Miller; and, with regard to the defendants concerned in that matter, I have no hesitation in saying that the duty is a plain one. The directors of this company, and the executive committee, who, in the intervals between the board meetings, took the place of the directors, had cast upon them the plain duty of devising a system which would render the travel of the public over this steam railroad safe, if operated; and it must also have been a system which plain men, if faithful and careful, could operate, and so the lives of the traveling public would be secured. They have attempted to perform that duty. They have devised a system, and, as I look at it, that system, if operated, is not only reasonably safe, but perfectly safe. Their system requires that each car that approaches this crossing shall be furnished with sand; that the car shall be brought to a stop at the beginning of the incline; that it shall proceed slowly, under the control of the motorman, down the incline, until it reaches a point about thirty feet away from the steam railroad; and, in order that it may proceed slowly and be able to stop at the designated point, there are the brakes and this sand. I see

not the slightest reason for doubting that, if that system be operated by men who are faithful and careful, that car would be brought to a stop thirty feet away from the steam railroad. I do not see how it can fail. I cannot think of conditions that, under the faithful operation of that system, would interfere with the stoppage of the car at that point. Then the conductor is to leave the car, enter upon the steam railroad, look in both directions, inform himself that no train is in sight — and it will be in sight if it is within about 1,000 feet — and, perceiving that it is not in sight, he is to give the signal to the motorman and the motorman is to cross the track. If that be faithfully and carefully carried out on the part of those people, an accident of this sort is not only not to be expected, not probable, but it is impossible. This kind of an accident can result only because the system is not properly operated. Now, then, so far as the duty of these defendants with regard to the devising of a system is concerned, that seems to me to be the end of the inquiry. There was no duty resting upon them to devise any particular system, but their duty was to devise some safe system, and they have done so.

It is suggested that the system ought to include a derailing switch. Well, it appears that there are two kinds of derailing switches. One involves the throwing up of a signal to the railroad train as soon as the switch upon the trolley line is closed for the passage of the car. Perhaps that would be an additional safeguard. I am not sure of it. Perhaps it would. These defendants, so far as they are chargeable with the devising of a system, endeavored, through their agent, Mr. David Young, to secure permission from the steam railroad to install that derailing switch. They could not do it without the consent of that railroad company. The consent was refused. That is out of the question, therefore. The other derailing switch contains the throwing up of no signal to the railroad train, and it seems to me to involve some dangers which are not attendant upon the present system. In the first place, it must be borne in mind that in the management of a trolley road the danger of a collision upon a railroad track is not the only danger to be considered. The lives of the people in the trolley car, and their limbs, are to some extent in danger whenever the car leaves the track. The lives of other travelers upon the

highway, their limbs, and their property may be endangered whenever the car leaves the track; and if you are to have an open switch, a switch kept constantly open, in the trolley lines, so that, if the car comes to it without stopping, it will leave the track and pass upon the ordinarily traveled portion of the highway, you have produced a condition which, to some extent, endangers the people upon the car, and endangers the travelers upon the highway. And this danger is one that constantly exists; it exists with every car; it does not exist merely when there is a conjunction of the coming of the steam railroad train and the coming of the car, but it exists with every car; and it is to be considered. Then there is this additional danger: That, under this derailing system, it being agreed that the derailing switch must be placed at least 100 feet away from the crossing, the signal to the motorman to cross must be given while he is 100 feet away from the steam railroad track, so that the lapse of time after the giving of the signal, when he is 100 feet away from the point of crossing, will be greater than when the signal can be given to him when only thirty feet away from the point of crossing; and during that time, therefore, there will be an increased danger that the train which is to be guarded against may not have been observed by the conductor, either because he was somewhat negligent, or because it may not have come into view, even though he were not negligent, for there are all sorts of conditions of the atmosphere. Sometimes a man thinks he can see a train 1,000 feet away, but because of the haze and mist he cannot. Rarely is the condition such that he cannot see the approach of a train when it is 100 feet away and he is stationary, or 200 feet away.

So that these matters are plainly matters of judgment and doubtful determination, in my view, and I have not the slightest hesitation in saying that there cannot rest on these defendants, who are charged with devising a system for the management of the trolley road, a plain duty to install a derailing switch such as they were permitted — such as they had power — to install in the present case. If such systems are to be installed, the Legislature must direct them and take the responsibility. The defendants may or may not, but it cannot be said that there is a plain duty to install any such system; and when, therefore, they devised

the system which, it seems to me, is perfectly safe if operated by careful and faithful men, they did their whole duty in that respect.

Now, then, we come to the occurrence itself. What was the cause of this accident? According to the testimony, it was the failure of the motorman to use sand. There cannot be a doubt that if this motorman, in addition to his brakes, had discharged the sand upon the tracks, his car would have stopped, and the accident would have been avoided. Now, the fact that he did not use sand is proven. A legitimate inference may be drawn from that fact, and, if such legitimate inference will point to the omission of a plain duty upon the part of any one of these defendants, then, of course, there would be evidence to go to the jury upon the question of guilt. But we must remember that at all stages of a criminal trial the defendant is surrounded with the presumption of innocence, and, while reasonable inferences may be drawn from circumstances which are proven, those inferences will go no further in the direction of guilt than is reasonably necessary. Now the fact is that the motorman did not use sand. I think it might be inferred from that fact that he had not sand upon his car. Why may that be inferred? Well, it may be inferred because he had some time for deliberation, and he must have perceived that his car was in danger of running on in spite of his brake; he must have perceived that for several seconds — fifteen or twenty seconds — and it was a plain appliance; and I think, therefore, if he had had sand, it would be fair to say that he would have used it, and, if he did not use it, it would be reasonable to say that he did not have it. But how far back does that carry the blame? This company, these directors, and this executive committee had declared in their rules that it was the duty of two persons to see that every car was provided with sand. Those two persons were the motorman and the starter, and, if you infer that the car was without sand, why, then, you infer fault in the motorman and the starter, for both of them had the duty to provide the sand; but none of these defendants is either motorman or starter, and you cannot carry the inference beyond that. You cannot infer that sand was not provided, for you have carried the inference as far as it is necessary to carry it; and, as against

a presumption of innocence, that is as far as it may be carried in a criminal case.

But then it is said that the track was slippery. But that was a normal condition. That was a condition to be expected, and it was a condition that had been provided against, for the sand was designed to be used on the slippery track. Under ordinary circumstances, the brake would hold the car. It is impossible to say there was a plain duty upon the part of any of these defendants to see that there was no snow ever upon the track. When we remember that wagons and people were constantly passing and repassing over this track while the snow was upon the street, why, we can see, of course, that there necessarily must have been occasions when the track would be somewhat covered with snow. And the company had provided for that contingency, so that none of those things seem to me to be at all chargeable to any of these defendants.

Now, the other circumstance suggested against the defendants is the crowding of the front platform. I am inclined to think that it would be a fair question for the jury to determine whether these defendants, even the highest of them, were chargeable with knowledge that that platform or that the platforms of those cars were likely to be crowded, and for this reason: It had been going on for several months, and the testimony in the case is that the company had been so far apprised of the crowding of the cars at this place during school hours that they had concluded to put on special cars, so that the attention of the company, and, I think it might be inferred, the attention of the higher officers of the company, was called to the fact that the front platforms of those cars were likely to be crowded by these children; and, if I could see in the evidence anything to indicate that the crowding of that platform had been an efficient cause of this accident, I would think that these defendants must have their cause submitted to the jury. But in my view, all of the testimony on that subject indicates that the crowding of the platform did not contribute to the accident. No witness says that the motorman was in the least interfered with in the discharge of his duty. All that speak on that subject say that he was not interfered with in the discharge of his duty. It is suggested that the evidence of the

young man, Shapiro, indicates that he was interfered with, but I do not think so. All that he says is that the children upon the platform, when the situation became dangerous, jostled him, crowded upon him, so that he was compelled to jump off the car; but, of course, as soon as the danger became apparent to the children on the platform, they would seek the nearest mode of escape, and it would be strange indeed if they had not jostled him, and the wonder is that more than he had not left the platform at that moment. But I see nothing in that worth speaking of as overcoming the opposing testimony showing noninterference and the presumption of innocence. And we also have seen that the motor-man actually did operate his brake. The wheels were brought to a standstill. So that all the testimony, I think, as I look at it, shows that the crowding of that platform was not a contributing cause to the accident.

Looking at the whole case, I am unable to put my finger upon a single circumstance, established or tending to be established by the testimony, out of which any inference of guilt upon the part of any of these defendants can be drawn. Hence I concur in the view of the other judges that the jury ought to be directed in this case to find that the defendants are not guilty.

The CHIEF JUSTICE.

Gentlemen of the jury: You will have observed, of course, from what has been said by the several judges who have presided over the trial of this cause, that the duty which you have to perform is a mere formal one — to render a verdict in accordance with the instructions of the court. The responsibility which attaches to that verdict does not rest upon you, but upon the court which directs it. In the performance of the duty which the law imposes upon you, it will be enough if the foreman speaks for the jury, and declares the verdict as the court has directed.

A verdict of not guilty was accordingly rendered.

Mayor, etc., of Jersey City v. Consolidated Traction Co.

(New Jersey — Supreme Court.)

LEASE OF STREET RAILROAD; LIABILITY FOR LICENSE FEE.—By force of the statutes approved March 14, 1893 (P. L. 1893, pp. 296, 314; Gen. Stats. pp. 3234, 3235, §§ 117, 135), which authorize one street railway company to lease its property and franchises to another, and the lease made by the Jersey City & Bergen Railroad Company to the Consolidated Traction Company, in which the lessee assumed all the burdens and liabilities of the lessor, Jersey City can enforce against the lessee the liability of the lessor to pay the city a fee for each car run on the railroad.¹

(Syllabus by the court.)

DEMURRER to declaration overruled. Decided February 29, 1904. Reported (N. J. L.) 57 Atl. 446.

Gilbert Collins, for plaintiff.

Frank Bergen, for defendant.

Opinion by DIXON, J.

In this declaration the plaintiff, the mayor and aldermen of Jersey City, alleges the same facts as are set forth in the declaration by the same plaintiff against the Jersey City & Bergen Railroad Company, which is the subject of the foregoing opinion, and in addition, avers that on September 25, 1893, the property and franchises of said Bergen Company were leased and transferred, subject to all burdens and liabilities of said company, to the defendant in the present suit, the Consolidated Traction Company, which thereupon assumed said burdens and liabilities, and that afterward, until May 25, 1898, the Consolidated Company continuously ran cars on the tracks constructed in pursuance of the ordinances before mentioned, and thereby became liable to pay to the plaintiff the said license fee of \$10 for each car, annually in advance. To this declaration the defendant demurs.

1. As to the effect of consolidation of street railway companies upon their liability for the payment of special assessments for street improvements, see *Lincoln St. Ry. Co. v. City of Lincoln* (Nebr.), 84 N. W. 802. As to right of municipalities to impose license fees, see *Nellis Street Surface Railroads*, p. 595.

The authority of a corporation owning or operating a street railway in this State to lease its property and franchises to another street railway company is derived from two acts of the Legislature, approved March 14, 1893 (P. L. 1893, pp. 296, 314; Gen. Stats., pp. 3234, 3235, §§ 117, 120). These acts authorize the lease to be made for such terms, and upon such conditions, limitations, and restrictions, as the lessor and lessee may agree upon (§ 1, Gen. Stat., p. 3234, § 117). Section 16 (Gen. Stat., p. 3241, § 135) authorizes the company accepting such a lease to use and operate the franchises and property so leased, and declares that "all debts, liabilities, and duties of the lessor corporation shall thenceforth attach to the lessee corporation and be enforced against or enjoyed by it to the same extent and in the same manner as they were enforceable against or enjoyed by the lessor corporation." In the suit against the Bergen Company, we concluded that the facts there stated showed a liability on the part of that company to pay the stipulated license fee to the city. That being so, then, in view of the foregoing provisions of the statutes, under which the lease from the Bergen Company to the present defendant was made, and the averment in the declaration that the defendant, by the lease, became subject to and assumed all the burdens and liabilities of the Bergen Company, we do not perceive any answer to the claim of the city that it may enforce this liability against the defendant for cars run by it over the railroad to the same extent and in the same manner as it might have enforced its claim against the Bergen Company if the lease had not been made. This explicit statutory provision renders it unnecessary to consider the views expressed in *Cape May v. Cape May Trans. Co.*, 64 N. J. L. 80, 44 Atl. 948, or whether the broad doctrine announced in *Mayor, etc., of New York v. Twenty-third St. Ry. Co.*, 113 N. Y. 311, 21 N. E. 60, would sustain the present suit.

The plaintiff is entitled to judgment on the demurrer.

In the case of *Mayor and Aldermen of Jersey City v. North Jersey Street Ry. Co.*, the declaration is not legally different from that against the Consolidated Traction Company, above considered. Therefore, on the same grounds the same judgment should be rendered.

Searles et al. v. Elizabeth, P. & C. J. Railway Co.

(New Jersey — Supreme Court.)

1. **DUTY TO CONTROL CAR.**— It is the duty of the motorman upon a street railway, when approaching an intersecting street, to have his car so far under control that he will not endanger the safety of other persons, on foot or in vehicles, engaged in the lawful and customary use of the highway in question.
2. **EXCESSIVE DAMAGES.**— In an action for damages for personal injuries growing out of a trolley accident, the defendant sought a new trial on the ground of excessive damages. If the disability resulting from the injuries was likely to be permanent, the damages would not be regarded as so excessive as to warrant an interference with the verdict. But it appearing that the trial was brought on so soon after a surgical operation on the patient that sufficient time had not elapsed to enable the physicians to determine as to whether the operation would result in her complete or partial recovery—a result which they regarded, however, as highly probable—and it thereby appearing that justice had not been done by the verdict, it was held that, in the exercise of its sound discretion, it became the duty of the reviewing court to set aside the verdict and grant a new trial.

(Syllabus by the court.)

RULE to show cause made absolute and new trial granted. Decided February 24, 1904. Reported (N. J. L.) 57 Atl. 134.

Craig Marsh, for plaintiffs.

Frank Bergen, for defendant.

Opinion by HENDRICKSON, J.

The plaintiffs in this case, who are husband and wife, brought suit against the defendant company for damages resulting from a collision between a carriage in which the wife was riding and

1. **Duty to control car approaching street intersection.**— In the populous portions of a city where the streets are much used by the traveling public, the person in charge of a street car must keep the car under such control as to be able to stop within a reasonable distance upon approaching a space where pedestrians and others are constantly crossing the track. *Watson v. Minneapolis St. Ry. Co.*, 53 Minn. 551, 55 N. W. 742.

Mr. Nellis, in his work on *Street Railroad Accident Law*, p. 252, lays down the following rule as applicable to collisions of a street car with

the defendant's trolley car. The carriage was overturned, and the wife sustained severe bruises of the head, limbs, and spinal column. The trial was had at the Union circuit, and the jury awarded as damages to the wife \$12,000, and to the husband \$3,000. A rule to show cause was allowed by the trial judge. The grounds relied on in the application for a new trial are (1) that the verdicts were against the weight of the evidence; and (2) that they were excessive.

Under the first ground, the contention is that negligence on the part of the defendant was not shown. The accident occurred at the intersection of Madison avenue and Fourth street, in the city of Plainfield. For convenience, I will refer to the wife as plaintiff. She was riding in a buggy with her sister, who was driving along Madison avenue in a southerly direction; and, as they approached Fourth street, which runs east and west, along which ran the defendant's railway, the driver halted, as plaintiff's witnesses testify, when the horse was about twenty feet from the track, and the driver looked east to Arlington avenue, distant about

pedestrians or vehicles at street intersections: "At the intersection of two streets a pedestrian or the driver of a vehicle has the right to cross the tracks of a street surface railroad, notwithstanding a car is in sight, provided there is a reasonable opportunity to do so without obstructing the passage of the car unnecessarily; and if, for that purpose, it is necessary for the person having charge of the motive power of the car to check its speed, or even to entirely stop the car for a short period, it is his duty to do so, and the person crossing the track has the right, without being necessarily chargeable with contributory negligence, to assume that that duty will be performed; the rights of the pedestrian or the driver of the vehicle and of the person in charge of the motive power of such car, under these circumstances, are reciprocal, and each is bound to use equal diligence to avoid a collision."

It is the duty of the motorman to manage his car in a reasonably prudent and careful manner, having in view all the conditions which surround him at the particular place where he may be. It is his duty to keep his car under reasonable control so that he can stop it promptly if occasion arises for him to do so. And while there must be conceded to vehicles of this kind the right to run at a considerable rate of speed, yet that speed must in all cases be such as is reasonable and safe in view of the correlative rights of persons upon the streets. *Nellis Street Railroad Accident Law*, p. 259.

It is the duty of a motorman to keep his car so far under control as to avoid injuries to pedestrians or persons in vehicles who are in the exercise of due care to avoid injury, and it is a question for the jury as to whether

265 feet, and saw no car, and then looked west, and saw no car, but saw a lumber wagon approaching the crossing rapidly from that direction. She then started to cross with her horse on a slow trot across the track. There was evidence also tending to prove that, when the car was 200 feet away, the horse was within twenty feet of the track, and in plain view from the motorman's position. The evidence of the driver and the plaintiff is that while in the act of crossing, and when the horse and the two front wheels were over the track, they heard a noise to the left, and looked, and the car was virtually upon them, and immediately struck the hind wheels of the buggy, causing its overturn. As to the speed of the car, one or more witnesses described it as rapid, and one as about seven miles an hour, while the motorman described it as "a pretty good speed," which he designated as "ordinary speed." The motorman further testified that when the car was about forty feet from the crossing he first saw the carriage, and that then the driver held up her lines as if she meant to let him pass; that he then put on his brake and reversed

the motorman of a street car lost control thereof because the car was running at a dangerous rate of speed. See *Birmingham Ry. & E. Co. v. City Stable Co.*, 119 Ala. 615, 24 So. 558; *Cox v. Wilmington City Ry. Co.* (Del.), 53 Atl. 569; *Gray v. St. Paul City Ry. Co.*, 87 Minn. 280, 91 N. W. 1106; *Consolidated Tract. Co. v. Glynn*, 59 N. J. L. 432, 37 Atl. 66; *Cincinnati St. Ry. Co. v. Snell*, 54 Ohio St. 197, 43 N. E. 207, 32 L. R. A. 276; *Strauss v. Newburgh Elec. R. Co.*, 6 App. Div. (N. Y.) 264, 39 N. Y. Supp. 998; *Richmond Ry. & Elec. Co. v. Garthwright*, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220.

In the case of *Evansville St. Ry. Co. v. Gentry*, 147 Ind. 408, 43 N. E. 311, 37 L. R. A. 378, it was held that running an electric car at an unusually rapid rate of speed over a much-frequented crossing, when the usual rate of speed is from twelve to fourteen miles per hour, constituted negligence which is little less than wanton and reckless disregard of human life. And in the case of *Chicago City Ry. Co. v. Loomis*, 102 Ill. App. 326, 66 N. E. 348, it was held that a verdict for the plaintiff should be sustained on the ground that the court could not say that it was not negligence for the motorman to disregard the probability that pedestrians delayed by wagons at a crowded street crossing might come close after them on the track, and to move his car at such a speed that it could not be stopped within a distance of six feet.

As to what constitutes a negligent rate of speed, see cases cited in note to *Warner v. St. Louis & M. R. R. Co.*, *ante*, p. 520.

the power, stopping the car as quickly as he could. The car went over the middle of the avenue before it was brought to a stop.

Do the facts in evidence present a case for the jury? It is contended for the defendant that the car must have been in sight when the driver looked, and that the failure to see cannot aid the plaintiff in proof of negligence against the company. Citing *P. R. Co. v. Richter*, 42 N. J. L. 180. But the fact here assumed is at least debatable. There was evidence that the defendant's car, at the rate of seven miles an hour, would make the distance in twenty-five seconds. So it is quite probable that the car may not have been in view when the driver looked. The law cited had relation to the question of contributory negligence in approaching a steam railroad. Neither of these conditions exist in the present case. The question of contributory negligence does not arise, because the plaintiff was only a passenger in her sister's buggy at the time of the collision. The trolley has no supreme right to the use of the public street. *Woodland v. Street Ry. Co.*, 66 N. J. L. 455, 49 Atl. 479. And it cannot be run at a rate of speed incompatible with the lawful and customary use of the highway by others with reasonable safety. *Railway Co. v. Block*, 55 N. J. L. 605, 27 Atl. 1067, 22 L. R. A. 374. Due care on the part of the motorman in approaching this crossing required that he should have his car under such control that the safety of the careful traveler thereon would not be endangered. *Traction Co. v. Glynn*, 59 N. J. L. 432, 37 Atl. 66.

Another principle involved in this case is that a driver at a crossing may obtain the right of way over a street railway, when, in the reasonable exercise of his rights, he reaches the point of crossing in time to safely go upon the track in advance of an approaching car; the latter being sufficiently distant to be checked or stopped, if need be, by the exercise of due care. *Railway Co. v. Miller*, 59 N. J. L. 423, 36 Atl. 885, 39 Atl. 645; *Earle v. Traction Co.*, 64 N. J. L. 573, 46 Atl. 613. See also *Traction Co. v. Lambertson*, 59 N. J. L. 297, 36 Atl. 100.

We think the facts developed at the trial fairly raised the question of negligence on the part of the defendant company, and that the evidence is sufficient to support the verdict upon that question.

But the second ground of the application impresses us more favorably. If the plaintiff's disability from her injuries should

be permanent in character, we would not deem it to be our duty to disturb the verdict. Nor, under ordinary circumstances, would we be inclined to question the finding of the jury upon that subject. But it is disclosed by the evidence that at the time of the trial the plaintiff was unable to sit up, and had to be brought into court in a reclining posture. This was not due to a condition directly caused by her injuries, but to the effect of a recent surgical operation, which was expected to bring about the patient's complete recovery. The evidence shows that the plaintiff's injuries for some time after the accident did not appear to be so serious as they did later on. She was about in two weeks, and could walk or ride unattended. She suffered much with her back, and sought the treatment of an expert surgeon in New York on November 22, 1902, which was three months after the accident. She could then walk. She came to the doctor's office unattended, and sat while telling the history of her case. The doctor said in his testimony that she was apparently a great sufferer, and showed a disinclination to sit long in one position, saying she could not do so. The result was that, after a month or six weeks of ordinary treatment, the patient still complaining as much as ever, the doctor testified that an operation was resolved upon, which consisted of the removal by an incision of the coccyx at the end of the spine. This was done on April 4, 1903, and the trial took place on May 6th following. According to the medical testimony, a lapse of a month or six weeks is necessary after the operation before relief to the patient may be expected. In reply to a question of plaintiff's counsel as to whether, if there was to be a recovery, it would be a matter of months or years, under the most favorable circumstances, the surgeon testified as follows: "A. Well, I don't quite like to say years; yet I am willing to say months. Now, my reason for this hesitancy is Mrs. Searles' extraordinary good looks — that she is apparently well nourished and developed. She seems to be a woman of a good deal of character; a woman of a good deal of fortitude; a good deal of physical resistance — that is, resisting power; and I confess to a degree of disappointment that she has not got better up to the present time. If Mrs. Searles should be a sufferer three or five years from now, I don't know that I should be disappointed; yet I see no reason why she should not ultimately recover from

this affection." Upon the question as to the final result of the operation, he further testified on cross-examination that the time had hardly been sufficiently long to predicate an opinion upon it; that he thought the parts were not quite healed as yet, and that it was hardly fair to assume yet that this was not going to be followed by a certain amount of relief; and that it was his earnest hope that the operation would be followed by a complete recovery. Another of the plaintiff's physicians testified that he did not think sufficient time had then elapsed to get the full benefits that might follow from the operation. We think that to permit the verdicts to stand under these circumstances might work injustice to the defendant, while the granting of a new trial would give the parties an opportunity to retry the cause with the added light as to the nature and character of the plaintiff's injury and disability which the lapse of further time would naturally develop. This is a power the court may exercise in its sound discretion, where, by reason of mistake or surprise at the trial, it can see that justice has not been done by the verdict. *Hutchinson v. Coleman*, 10 N. J. L. 74; *Moore v. Railroad Co.*, 24 N. J. L. 277 (Potts, J.).

The result is that the rules will be made absolute, and a new trial granted.

Paterson & State Line Traction Co. v. Wostbrock.

(New Jersey — Court of Chancery.)

WITHDRAWAL OF CONSENTS OF ABUTTING OWNERS FOR THE CONSTRUCTION OF STREET RAILROADS.¹—Under the statute (Act of April 21, 1896, P. L. 329), which provides that a municipality shall not grant its permission to construct a street railroad until there shall be filed with the city clerk the consent in writing of at least one-half in amount in lineal feet of property fronting on the streets, it was held that the consents of abutting owners only had reference to a particular application for permission to construct the railroad, and if the application was denied by the municipal body having power to grant it, the consents, if withdrawn before being filed, are not enforceable when an application for the permit is not pending.

1. As to the requisites and effect of consents of abutting owners for the construction of street railways, see monographic note, 1 St. Ry. Rep. 528. In the case of *Adee v. Nassau Elec. R. Co.*, 65 App. Div. (N. Y.) 529, 72

SUIT for injunction and other relief against abutting property-owners attempting to withdraw consents for the construction of street railroads. Decided December 31, 1903. Reported (N. J. Eq.) 56 Atl. 698.

Preston Stevenson and Mr. Collins, for complainant.

Cornelius Doremus, for defendants.

Opinion by EMERY, V. C.

Complainant is a traction company organized under the act of March 14, 1893, and previous to the time of filing the bill had applied to the borough council of the borough of Midland Park to construct and operate its road on a portion of the street known as Godwin avenue, within the borough, and between certain points on that avenue, designated in the application. The application was made under the act of April 21, 1896 (P. L. 329), which, in reference to the matters now in controversy, provides (§ 1) that no street railroads should thereafter be constructed upon any street or highway, except upon the consent of the governing body of the borough or other municipality; that such consent should be granted only upon petition of the corporation desiring to construct the road; that before such petition be granted public notice of a hearing upon the application should be given (in a manner prescribed); and that upon the date fixed by the notice, or the date to which the hearing should be adjourned, the governing body might by ordinance, and not otherwise, grant, or by resolution might refuse, permission to construct the road upon the street or highway named in the petition; "provided, however, that such permission to construct, maintain and operate a street railway shall in no case be granted, in whole or in part,

N. Y. Supp. 992, affirmed, 173 N. Y. 580, 65 N. E. 1113, it was held that the consents of property-owners properly executed and recorded as required by statute confer not merely a license revocable at the will of the abutting owners, but convey permanent rights binding upon the owners and their grantees. It was further held that the amendment of 1895, chapter 545, to the New York Railroad Law, rendered nugatory the suggestion in the case of *White v. Railway Co.*, 139 N. Y. 19, 29, 34 N. E. 887, that the consenting party might withdraw his consent if he had given it without valuable consideration, and if the other party had done nothing under it so that its position would not be unfavorably affected by such withdrawal. See also *Paige v. Schenectady Ry. Co.*, *post*, p. 762.

until there shall be filed with the clerk of such governing body, or other equivalent officer, the consent in writing of the owner or owners of at least one-half in amount in lineal feet of property fronting on the streets," etc., "or upon the parts of the streets," etc., "through or upon which permission to construct, operate and maintain a street railway is asked, * * * which consent shall be executed and acknowledged, as are deeds entitled to be recorded. * * *" The application by petition was made to the borough council on April 14, 1902, and on July 1, 1902, a date of the meeting of council to which the hearing or proceedings on the application had been duly adjourned, the complainant had procured the necessary consents of the owners of 51 per cent. of the total lineal frontage, which was 4,592 feet. Defendant Henry J. Wostbrock, as the owner of 695 feet, and defendant Mary J. Wostbrock, as the owner of 412 feet, had given consents in writing to the construction of the road. None of the consents of any of the owners had been filed previous to the meeting of July 1st, and at that meeting of council the consents were produced to the council, but at complainant's request were not filed. The ordinance granting permission to construct the road was amended at this meeting, and was then as amended adopted on second reading, and passed to its third reading. After this action defendant Henry J. Wostbrock announced that he withdrew his consent, and at his request, notwithstanding the objection of the complainant, the paper withdrawing or claiming to withdraw his consent was placed on file. The meeting then adjourned, and the next regular meeting of the council—the first meeting at which the ordinance could be read a third time and passed—occurred on July 14th. On July 11th this bill was filed against Henry J. Wostbrock and Mary J. Wostbrock to enjoin the interfering, by word, deed, or writing, with complainant's use of the consents, and to compel the withdrawal by Henry J. Wostbrock of the paper filed by him with the borough council, or the execution of some document to be filed with the council nullifying or canceling it. The defendant Mary J. Wostbrock had not formally withdrawn her consent, but, as complainant alleged, threatened to do so through her agent, Henry J. Wostbrock, her son, and a similar injunction was prayed against her. On this bill an order to show cause, returnable July 22, 1902,

was granted, with an *ad interim* stay, against withdrawing, revoking, or attempting to revoke the consents delivered to complainant, the restraint (which was granted *ex parte*) being on the condition that pending the return of the rule complainant refrain from filing with the council either of said consents. The borough was not a party to the bill, no injunction against its proceeding pending the hearing was applied for, and on July 14, 1902, at the regular meeting of the council, a resolution was offered and passed that the application of the complainant be denied, and that no further action be taken in reference thereto. This resolution has not been questioned by the complainant, and up to the time of the hearing no subsequent application to construct the road in the borough had been made. Complainant, however, claims to be entitled to a declaration or decree establishing the validity of the consents, and to have the rights conferred upon it by the consents protected or secured for the future by injunctions against interference with the consents by word or act, or clouding complainant's title or right under them. The claim to this relief is based upon the contention that the consents of the defendants were given for or are based on valuable consideration, that they are rights in the nature of or analogous to easements, and are property rights to the recognition and protection of which complainant is entitled, and that the only adequate method of protecting complainant's rights in the consents is in equity and by injunction against interference with them. The defendants, on the other hand, claim that the consents were not based upon consideration, but were voluntary, that they confer no property rights, that the consents are revocable at any time before they have been filed with the borough clerk, and that, the application for which they were given having been finally disposed of by the resolution of the council, the consents cannot be again used on any subsequent application, and have no longer any validity whatever. The jurisdiction of the court to grant any relief in the premises is also denied. The right of the complainant under these consents, whatever may be its scope and extent, is in its primary character a right legal rather than equitable, and the character and nature of these rights are, therefore, in the first instance, to be ascertained by the decisions of our courts of law, and this court upon this application must be controlled by these decisions.

The owner of lands abutting on the public street has no such interest or right in the lands included within the public street as to make his consent necessary for the construction and operation of a street railroad upon the street. *Roebeling v. Passenger Ry. Co.* (1896), 58 N. J. L. 666, 670, 34 Atl. 1090, 33 L. R. A. 129. While the Legislature may, therefore, authorize the construction without the consent of the abutting owners or any of them, it may, however, lawfully require such consents, and the requirement that the owners of a majority of lineal feet in frontage shall consent is a valid exercise of legislative power in relation to such consents. This privilege or right of the abutting owner to consent is derived altogether from the statute, and its nature, scope, and extent depends altogether upon the statute which confers it. Under the Traction Act the consents are given effect and are operative only in connection with the authority delegated to the municipal authorities to grant permission to construct the road, and on the face of the statute the requirement of the consents is purely a limitation or provision on the authority of the municipal body to grant the franchise; and it is a limitation or proviso affecting only the power of the council on the final grant or passage of the ordinance, for the consents (which are required to be filed) may be filed on the final passage of the grant. *State (Hutchinson, Pros.) v. Belmar* (Sup. 1898), 39 Atl. 643, 645. Being, however, documents which are to be used in connection with the application, they may be filed with the application or at any time after, and when thus filed the right of the street railroad company to the statutory operation of the consents filed becomes, for the purpose of the pending application, effective as to the abutting lands included within the consents filed, so that no subsequent alienation of the lands or withdrawal of the consent can operate to affect the consent given. *Currie v. Atlantic City* (1901), 66 N. J. L. 140, 146, 147, 48 Atl. 615, 66 N. J. L. 671, 50 Atl. 504.

The decision upon writ of error in this case leaves the question of the right of such withdrawal open for future decision by the Court of Errors, but the opinion of the Supreme Court that no withdrawal of consent could be made after a sufficient number had been filed to give the council jurisdiction was not expressly questioned or doubted, and for the purposes of this application in

equity, to assist in the protection of a legal right, the decision of the Supreme Court must be taken as settling the question of the present status of the legal right. The decision of the Court of Errors and Appeals in the Currie case also holds (page 674, 66 N. J. L., and page 505, 50 Atl.) that after the council had acted on one application of the company under the statute, either by the passage of an ordinance granting the permission (after consents filed) or by resolution denying it, the statutory authority of the council on the pending application is exhausted, and the council becomes thereafter *functus officio*, so far as regards the subject-matter of the application. In the present case, the resolution denying the application of complainant to construct its road having been passed by the council subsequent to the filing of the bill, there is now no application pending relative to which the consents in question can be held to apply. The only basis, therefore, upon which the complainant's bill can now be rested, is that the consents give to it such rights against the persons who have given them as to entitle it to a declaration or decree preventing threatened interference with the right conferred by the consents. Complainant claims that, the consents having been granted upon consideration, they are in the nature of property rights or easements. The decision of the Supreme Court in *Military Academy v. North Jersey Street Ry. Co.* (1900), 65 N. J. L. 328, 47 Atl. 890, establishes that the abutting owner, who is such at the time of consent, has such an interest as entitles him to dispose of his consent for a consideration; but this interest is, in my judgment, a personal interest only in the matter of application pending or to be brought before the municipal council. For his consent to such application he may lawfully require compensation, and if his consent is received and acted on (without withdrawal), as in the *Military Academy* case, he would be entitled to recover the promised consideration. But the manifest object of the provision allowing consents was not to give to every abutting owner, as such, a right to consent for all future owners of the land to any future application, but to require the consent of those who were owners of the land at the time of the application to be acted on. Any other view of the nature of the consent would, under color of this statutory consent, confer upon an abutting owner a transferable property right in the street, which

has always been denied to them. There is not, therefore, and there cannot be, under our decisions, any right to consent, which is a general property right or easement attached to the ownership of the property, and the only right which complainant can enforce under such consents must be the statutory right which arises only in connection with some application or proposed application to the council for constructing its road.

No application is now pending, and none may be hereafter made. No declaration should, therefore, be now made as to the right of withdrawal or the effect of the previous withdrawal. If on any subsequent application the defendants still remain the owners of the property in question, and the complainant file the consents in question, the question of their effect, and of the jurisdiction of this court to protect the consents and effectuate their purpose by injunction or otherwise, may be considered; but, according to my present views, an application pending before the council and the filing of the consents are, under the statute, necessary preliminaries to the creation in the complainant of the statutory legal right which the court is asked to protect by its injunction or decree.

The bill, therefore, must be dismissed.

West Jersey & S. R. Co. v. Atlantic City & S. Traction Co. et al.

(New Jersey — Court of Chancery.)

1. STREET RAILWAY CROSSING STEAM RAILROAD;¹ JURISDICTION.—Jurisdiction to determine how conflicting easements of way across the same place shall be occupied and used by two or more holders of such easements is vested in the Court of Chancery.
2. SAME.—That jurisdiction is one of the inherent equitable powers of the Court of Chancery, which is incapable of exercise by any other forum, and is protected by article 6, section 1, of the Constitution of this State.

As to rights of street railways crossing other railroads, see monographic note, 1 St. Ry. Rep. 140. See also *Oneonta, C. & R. S. Ry. Co. v. Cooperstown*, 1 St. Ry. Rep. 597, 85 App. Div. (N. Y.) 284, 83 N. Y. Supp. 307; *Boston & M. R. Co. v. Saco Valley Elec. R. Co.*, 2 St. Ry. Rep. 376, (Me.) 56 Atl. 202. See *Nellis Street Surface Railroads*, pp. 186-192.

3. *SAME*.— It is unaffected by any legislative franchise granting to a corporation an easement of way, or by a legislative charter which empowers a municipality to regulate streets and railroad crossings within its bounds.
4. *SAME*.— Where a newly organized company is authorized to lay its railroad tracks at grade across the existing tracks of another railroad, and the construction proposed involves only such a crossing, the new company should pay the expenses incident to the safe construction of its tracks across those of the senior company.

(Syllabus by the court.)

BILL of complainant to determine rights as to conflicting easements. **Decided** January 8, 1904. Reported (N. J. Eq.) 56 Atl. 590.

J. H. Gaskill, for complainant.

E. H. Chandler and *W. H. Sponsler*, for defendant Atlantic City & Suburban Traction Co.

Harry Wootton, for defendant Atlantic City.

Oral opinion by **GREY**, V. C.

The questions argued in this cause, so far as they are affected by previous decisions, present points of law with which I am somewhat familiar. I have also had an opportunity during the argument to examine most of the cases cited by counsel. It is desirable that this case be speedily decided, as the defendant company's building of its railroad awaits its determination. The essential questions discussed are controlled by established principles, and can as well be decided now as upon further consideration.

The bill is filed by the West Jersey & Seashore Railroad Company, alleging that the tracks of its Chelsea branch cross Florida avenue, in Atlantic City, at grade; that the defendant the Atlantic City & Suburban Traction Company, an electric trolley company, has a right of crossing at the same place, and is about to construct its crossing there, also at grade; that the Atlantic Coast Construction Company is engaged in building the trolley road and crossing, and claims a right, therefore, to the temporary occupation of the *locus in quo* under its contract; that the Pleasantville & Atlantic Turnpike Company, or plankroad company, is a turnpike company also having a right to occupy Florida avenue at the same place, with the right to collect tolls, etc.; and that the city of Atlantic City, within whose bounds this particular crossing

at Florida avenue lies, has, under its charter, the right to regulate the use of the city streets and all crossings. All these parties have been made defendants and brought into court in this suit by the complainant, the bill of complaint stating the claim of each defendant at the crossing in question.

The bill shows that the city of Atlantic City has by ordinance acted on the question of the crossing of the steam railroad tracks by the trolley company's tracks, by authorizing the trolley company to cross the steam railroad tracks at grade, with no other precautions against danger of collision between the trains or cars of the two companies than a direction that the approaching trolley car shall be stopped, and the conductor go ahead and signal to the motorman when the trolley car may safely cross. This method, the complainant insists, is dangerous at this crossing, because of the great quantity of railroad and highway and intended trolley travel at the place in question, and it asks that the trolley company be restrained from constructing its crossing of the steam railroad tracks, the right to build which is admitted, unless they build an overhead crossing, or, if that be not practicable, and the crossing be constructed at grade, that the defendant company may be required to install an interlocking system of signals, with provision for the derailing of cars on one or the other set of tracks before reaching the crossing, or may be required to arrange its crossing in such manner as the court may, under all the circumstances of the case, deem to be safe and proper; invoking the jurisdiction of this court to prescribe a mode in which the right to cross at grade shall be exercised. So far as an overhead crossing is concerned, the complainant has not attempted, either by proof or argument, to claim that the circumstances of this case justify a decree that such a crossing should be required at the *locus in quo*.

The defendant Atlantic City and the other defendants, the construction company and the turnpike company, are here by simple appearance, making no active defense.

The Atlantic City & Suburban Traction Company makes a most energetic defense, which stands practically upon two points: First, that this court has no jurisdiction to hear and determine the questions submitted by the bill (the *locus in quo* being conceded to be within the municipality of Atlantic City), because the de-

fendant the Atlantic City & Suburban Traction Company has obtained a franchise from the State which authorizes it to cross the complainant's tracks at grade, and the city of Atlantic City has, by its charter, power to regulate grade crossings within that city, and, that city having by its ordinance prescribed a mode of crossing, that mode, even if it tends to injure or impair the enjoyment of the easements of other parties at the same place, is conclusive, and this court has no jurisdiction to alter or change the mode prescribed by the city authorities. Shortly stated, the defendant contends that the legislative grants of power to the traction company and to Atlantic City, and the action taken under those grants, have conclusively settled the rights of the parties at the crossing in question, so that this court has no jurisdiction in the matter. That is the first and most strenuously argued point, largely because in the course of the testimony the other point, as to what plan for protection ought to be ordered, has been, by the very efficient exposition of the best and most scientific mode of crossing, pretty nearly agreed to, though not finally settled, by the evidence here produced, and by the concessions of the parties, each to the other.

Upon the question of jurisdiction, it being shown that two or more railroad companies, or a railroad company and a turnpike company, or a railroad company and electric road, or a railroad company and the general public using the public highway, or all of them, have easements of way over the same place, usable by each according to its grant and its necessary implications, and that at the crossing in that spot there is danger of obstruction or impairment of the easement of one by the manner in which another uses or proposes to use its easement, or danger to the traveling public, there seems to me no doubt that the Court of Chancery has jurisdiction, when invoked by any person interested in any of the easements which each may have a right there to enjoy, so to regulate the manner in which the parties shall use their several easements that each of them, and also the public, may be saved from the threatened interference or danger. It is of no significance to say that the defendant has a legislative grant authorizing it to cross at grade, or that the city of Atlantic City, under its right to regulate grade crossings, has prescribed a mode. The grant of the franchise from the Legislature, and the fixing of the

mode of its enjoyment by the municipality, are essential incidents necessary to the existence of the defendant company's right; but they do not take away from the senior company, occupying the same place, its previously granted easement of way. When it appears that the new company's grant, as proposed to be used, threatens the impairment of the easement of the senior corporation at the same place, there must be some forum where this question can be judicially heard and determined. The application is a seeking to enforce the equitable maxim that every man shall so use his own as to do the least possible injury to his neighbor. The control of the manner in which conflicting easements may be enjoyed does not take away the rights of any of the companies holding the easements. It only judicially ascertains how each shall so use its own, that its use shall be the least disadvantage to the other. In the very nature of the case, the only forum in which relief can be sought must be a court of equity. No other has the remedies of injunction and receiver, which are necessary to the enforcement of the decree fixing the rights of the several parties.

The jurisdiction which is invoked is one which, in my judgment, is inherent in this court, and protected by the Constitution of this State. It existed as one of the general equitable powers of this court at the time the Constitution of 1844 was adopted, and is protected by the declaration of the Constitution (art. 6, § 1) under the head of "Judiciary," which provides that "the judicial power shall be vested in a court of errors and appeals in the last resort in all causes as heretofore, a court for the trial of impeachments, a court of chancery, a prerogative court, a supreme court," etc. There is in the Constitution no other ascertainment of the jurisdiction of this court than the declaration that its judicial power shall be vested "as heretofore." So that whatever jurisdiction the Court of Chancery had at and previous to the time of the adoption of the Constitution in 1844 it has now.

No legislation, whatever its form, can either directly or indirectly lessen or take away the constitutional powers of the Court of Chancery. Therefore all these enactments which have been appealed to, granting rights of incorporation or powers to municipalities to regulate streets and crossings, whether within or without a city, make no difference. They cannot take away the in-

herent constitutional jurisdiction of the Court of Chancery, in cases where all these functions have been exercised, resulting in the existence of conflicting easements, to hear the parties, and determine how each shall enjoy his right as against the others having easements in the same place. That is my understanding of the declaration of the jurisdiction of this court made by Chief Justice Beasley, sitting for the Chancellor, in the case of *Del., Lack. & Western R. Co. v. Erie R. Co.*, 21 N. J. Eq. 304, approved by the Court of Appeals in *Nat. Docks v. Central R. Co.*, 33 N. J. Eq. 767; *National Docks v. United Cos.*, 53 N. J. L. 224, 21 Atl. 570, and in the case of *Palmyra v. Pennsylvania R. Co.*, 62 N. J. Eq. 616, 617, 50 Atl. 369, which was unanimously affirmed on appeal (63 N. J. Eq. 799, 52 Atl. 1132). There is in those opinions no reference to the constitutional relation of this element of chancery jurisdiction, but there can, I think, be no doubt that the power to adjust and arrange the enjoyment of conflicting easements is within the original equitable powers of a court of equity.

The case now presented for consideration has some elements of novelty, in that it asks this court to prescribe a mode in which a traction company shall arrange and hereafter manage its crossing of a steam railroad company's tracks. In the leading case before Chief Justice Beasley, the dispute was between two railroad companies, concerning the use of the same tunnel. He allowed an injunction compelling an adjustment of the dispute; intimating that, if necessary, a receiver might be appointed to carry the court's decree into effect. The judgments in the cases of *Nat. Docks v. Central R. Co.*, 33 N. J. Eq. 767, and *Nat. Docks v. United Cos.*, 52 N. J. L. 224, 21 Atl. 570, present different grounds of dispute; but each involved the basic principle of a conflict between parties having easements of way at the same place, regarding the occupation or use of their rights. There is no substantial difference, as to the equitable jurisdiction, whether the contention between the parties arises for one reason or another. It is enough if there is a dispute touching the occupation or use of easements at the same place. The jurisdiction of this court is, I think, beyond challenge. It only remains to examine the proofs to ascertain how the respective rights of the parties at the *locus in quo* may equitably be adjusted.

At this Florida avenue crossing, the public highway, the steam railroad tracks, and the traction company's tracks will each cross the other at grade. The steam railroad at this place has double tracks. One track is a branch extending down to Chelsea from its main line, and the other track which runs alongside is used occasionally as a double-passage track, and usually as a storage track. The proof is that the use of these tracks varies greatly at different seasons of the year; that the locality which they serve is a part of Atlantic City, which is growing with rapidity, and constantly calling for more extended railroad service. It is here shown that the complainant company, in addition to the continued present use of its tracks for steam railroad purposes, intends very shortly to put trolley cars on the same tracks, and propel them by electricity. This will largely increase the passenger service on the steam railroad tracks over this crossing. The Atlantic City & Suburban Traction Company proposes to build its tracks at grade along the middle of Florida avenue — a public highway — across these steam railroad tracks, with no other precautionary arrangements than are required by the Atlantic City ordinance, which simply provides, as stated, for the stoppage of the electric trolley car as it approaches the railroad tracks until the conductor shall have run ahead, seen that there is no danger, and signaled to the car to come on. The motorman then starts the trolley car, and in that way it crosses the railroad tracks. That is all the protection that is afforded either to the steam railroad trains, to the trolley cars, or to the general public traveling the highway, all of whom cross at the same place. The proof is, and the indications all through the case are, that this Atlantic City & Suburban Company is a corporation which has a purpose and expectation of doing a large business in carrying passengers over its lines. Atlantic City is a place of phenomenal transient travel. The number of people annually carried to and from Atlantic City is many times its own population. Its greatest population in the summer season is probably ten times its smallest in the early winter. Both the increase and the decrease of this population are now carried by the complainant and another competing railroad company connecting Atlantic City with Philadelphia. That means an enormous amount of travel. The Atlantic City & Suburban Company is the first traction company to enter the city. It is obviously

seeking to carry a share of this great number of travelers to and from Atlantic City, and will be obliged to compete with the steam roads, which have double tracks, and run to Atlantic City from Philadelphia in from fifty-five to sixty minutes. It is, I think, quite plain that, in order to do anything at all in the way of competition for such travel, the Atlantic City & Suburban Company will have to use first-class trolley cars (probably in couples), and of large size, well equipped and fitted, and, in all likelihood, filled to the utmost extent with passengers, and will have to run such cars frequently and with great speed. The result now plainly indicated will be that this defendant company's cars at the particular place in question must cross the steam railroad tracks under circumstances which will necessarily be extremely dangerous both to those traveling in the trolley cars, to the passengers on the steam railroad company, and also to travelers in ordinary vehicles, wagons, automobiles, and the like, passing over the public highway. All of them are involved in the dangers of this crossing. The ordinance provision for safety protection seems to be quite inadequate, and to subject all the parties to liability to injury from collisions which may occur because of the frequent passage of these many different vehicles, with such variant motive powers, over the same crossing at grade.

The complainant company suggests the adoption, for greater safety, of a self-acting interlocking and derailing switch system, by which the tracks of the steam railroad or of the trolley company — one or the other — shall always be broken, so that a train or car passing on the one road would be derailed, when there is an indication of safety to the other. This is the plan used where main line tracks of steam railroads cross. It involves very expensive apparatus, and the constant attendance of a switchman. As originally proposed, it would cost, capitalizing the annual wages of the switchman, about \$37,000. The defendants have submitted several plans for the protection of the crossing. None of them require the presence of a switchman, but all of them provide that the trolley tracks shall, at a proper distance from the crossing, be broken until the conductor or motorman shall go from the approaching trolley car and turn a lever, which will, by the same motion, restore the trolley car tracks until the trolley car crosses, and give one or more danger signals on the steam railroad

tracks. The plan suggested by Mr. Lane, one of the defendant's experts, who brought with him working drawings, appears to me to afford all necessary protection and warning, and to be so adjustable to varying circumstances that it will meet and relieve against all the elements of inconvenience and danger at the crossing in question. This plan may have either one signal of warning to the steam railroad, or both a "home" and a "distant" signal, if desired. If electric cars be put on the present steam railroad tracks, this plan can be adjusted to meet the proposed change. Its expense will be about \$1,800. My impressions of the whole situation at this crossing favor the adoption of Mr. Lane's plan, as at once the most feasible, efficient, and economical to accomplish the object in view. The complainant requests a modification of Mr. Lane's plan, by which semaphore instead of disc signals may be put up, and both "home" and "distant" signals be provided on the steam railroad, and that a pipe shall be used, rather than a wire or chain, to work the derailment and restoration of the track. These suggestions appear to be reasonable changes, tending, without great additional expense, more effectually to accomplish the object sought. The parties appear to be able to confer with each other in a very proper spirit. It is for their mutual advantage that the details of the plan finally ordered shall be arranged by conference of their experts. I will advise a decree as above indicated — that Mr. Lane's plan, with the above-named changes, shall be adopted. I will, however, delay signing any decree for a few days, until the parties have an opportunity, if they choose to use it, to confer together and perfect such an arrangement under Mr. Lane's plan as they may agree upon. The decree may prescribe the plan so settled. This without prejudice to the right of either party to take an appeal from the decree so framed.

The expense of this plan of crossing should, in my judgment, be borne by the traction company. That may be a ground upon which that company may desire to appeal from the order here made, and that right shall not be imperiled by its assent to the precise formulation of the plan in the decree.

The steam railroad company was given the right to put its railroad at this crossing of the highway, and has built and completed its tracks, and is now in possession. The traction company has

since been given a crossing at the same place. While it is true that the traction company, with respect to the owner of the fee, is enjoying one of the modes of using the public right of way over the land for which the highway was originally taken (*Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75, 86 Am. Dec. 252), yet it is equally true that the trolley company has by its franchise acquired for itself a right to exclude from the habitual use of its tracks all those who may be engaged in competitive business (*Citizens' Coach Co. v. Camden Horse R. Co.*, 33 N. J. Eq. 267, 36 Am. Rep. 542). For this special convenience it affords the public in the use of the highway, it is authorized to charge its passengers a fee for using its cars. The construction of its tracks and the safe passage of its cars over steam railroad tracks in its route are means whereby the traction company acquires this privilege. There seems to be no equitable ground which requires the senior company, presently in occupation, to pay anything to enable the junior company to construct its own crossing in such a manner that it shall not impair rights of the senior company already vested and in enjoyment. It is the duty of the junior company so to build its tracks over the senior company's rails that the crossing may be safe. The junior company has no right to threaten to build them in a dangerous manner, and to require, as a condition of its change to safe construction, that the senior company shall pay its expenses in building on the safer plan.

This settlement of the mode in which the defendant company shall cross the complainant's tracks does not involve a reconstruction of the whole plan of the crossing in question, whereby the steam railroad tracks and the public highway will, for the better advantage of the parties now in possession, be changed from their present condition. It accomplishes only a crossing of the steam railroad tracks as they now are by those of the newcomer, the traction company. The latter company builds solely for its own advantage. It should, I think, in such a case, pay the expenses of the safe construction of its tracks across those of the steam railroad now on the spot.

I will advise a decree as above indicated. I will hear parties on the question of costs when the decree is presented for signature.

Bork v. United New Jersey R. & Canal Co. et al.

(New Jersey — Court of Errors and Appeals.)

1. **EJECTMENT AGAINST RAILROAD APPROPRIATING HIGHWAY.**¹—The owner of the fee of land, subject to an easement of a public highway, may maintain ejectment against an intruder who wrongfully appropriates the same to a purpose wholly foreign to the easement, but his recovery of possession will be subject to the easement in question.
2. **WRONGFUL APPROPRIATION OF STREET BY STEAM RAILROAD.**—The laying of a steam railway longitudinally in a street, unless by authority of a legislative grant, express or implied, will be regarded as such an exclusive and wrongful appropriation of that part of the street to a purpose foreign to the easement as to sustain such action of ejectment by the abutting owner against the company.

Syllabus by the court.)

Error by defendants from judgments for plaintiffs. Decided February 29, 1904. Reported (N. J. L.) 57 Atl. 412.

J. H. Gaskill, for plaintiffs in error.

F. D. Weaver, for defendants in error.

Opinion by HENDRICKSON, J.

This writ brings up for review a judgment of the Supreme Court entered upon a *postea* from the Camden circuit. The action is ejectment, and was brought by the plaintiffs, abutting owners

1. As to steam railroad operating in the streets constituting an additional servitude upon the property of abutting owners, see monographic note, 1 St. Ry. Rep. 313.

Use of streets by steam railroad.—The use of a city street by a steam railroad is inconsistent with the common and public use thereof, and is, therefore, an imposition upon the soil of a servitude differing from, and additional to, that of a proper and lawful street easement. *Grand Rapids & Ind. R. Co. v. Heisel*, 38 Mich. 62.

The Legislature may authorize the concurrent use of a highway by a railroad and by the public if it be for the public benefit. *Morris & E. R. Co. v. City of Newark*, 10 N. J. Eq. 352. But such authority must be given by express enactment, or if it rests upon implication it must flow necessarily out of the law from which it is derived. *Hoboken Land & Improvement Co.*

on that part of Front street, in the city of Camden, between Clinton street and Kaighns avenue, in order to secure the removal of the track and roadbed of the defendants, laid down by them in front of plaintiffs' premises for steam railway purposes. The use of the track was limited to the operation of freight cars thereon. A verdict for the plaintiffs of six cents damages was directed by the learned trial judge. A request of the defendants for an instruction to the jury that no recovery could be had for the premises described in the declaration was refused. To these rulings exceptions were taken by the defendants and sealed, and error has been duly assigned thereon.

The premises embraced in the suit was the strip of land between the center line of the street and the plaintiff's property line, containing the track and roadbed of the defendants, having a length

v. City of Hoboken, 35 N. J. L. 205; *City of Newark v. D., L. & W. R. Co.*, 42 N. J. Eq. 196, 7 Atl. 123; *Stickle v. Morris & E. R. Co.*, 19 N. J. Eq. 386. A statute which authorizes a railroad to construct its road between two given cities and to connect with any other roads built therein does not, by necessary implication, authorize the company to construct and operate its railroad longitudinally on the streets of such cities. *Davis v. East Tenn., V. & G. Ry. Co.*, 87 Ga. 605, 13 S. E. 567. See also *Chicago, D. & V. R. Co. v. City of Chicago*, 121 Ill. 176, 11 N. E. 907. Compare *Cleveland & P. R. Co. v. Speer*, 56 Pa. St. 325, 94 Am. Dec. 84; *Tenn. & A. R. Co. v. Adams*, 3 Head (Tenn.), 506.

Where the Legislature has authorized the construction of a railroad in the streets of a city a private individual cannot restrain such construction unless it be shown that special injury is thereby threatened. *Peterson v. Navy Yard, etc., Ry. Co.*, 5 Phila. (Pa.) 199. After the use of a street by a railroad is authorized as provided by statute, the construction of such railroad cannot be enjoined upon the ground that it would constitute a public nuisance. *Baxter v. Spuyten Duyvil, etc., R. Co.*, 61 Barb. (N. Y.) 428; *Black v. Philadelphia & R. R. Co.*, 58 Pa. St. 249.

An injunction will lie upon behalf of an abutting owner to prevent the construction and maintenance of railroad tracks in a street where it is shown that a public nuisance is thereby created and such owner will suffer special damage therefrom. *Kavanagh v. Mobile & G. R. Co.*, 78 Ga. 271, 2 S. E. 636; *Hyland v. Short Route Ry. T. Co.* (Ky.), 11 S. W. 79; *Schurmeier v. St. Paul & P. R. Co.*, 10 Minn. 82, 83 Am. Dec. 59; *Faust v. Pass. Ry. Co.*, 3 Phila. (Pa.) 164. An abutting owner on a city street may enjoin the construction of a railway in the street as a public nuisance, where it appears that such railway is being constructed without authority. *Thomas v. Inter-County St. Ry. Co.*, 167 Pa. St. 120, 31 Atl. 476.

of about thirty-seven feet and a width of two and one-half feet from the center line, subject to the public easement to and over said land.

The first ground urged in support of these assignments of error is that ejectment will not lie to recover possession of a portion of a public street; actual possession being inconsistent with the public easement, and constituting a nuisance, which would render the plaintiffs liable to indictment. The defendants cite as authority for this doctrine *Cincinnati v. White*, 6 Pet. 431, 8 L. Ed. 452; *Stiles v. Curtis*, 4 Day, 328. But the authority of the former case would be more persuasive if the point here referred to and there discussed had been necessary to the decision. For it will be remembered that the case was determined against the plaintiff in his suit to recover a plot of ground contained in what was known as a "city common," on the ground that it had been dedicated to public use by a previous grantor in the plaintiff's chain of title. But the law upon the subject now under discussion has so long been settled in this State against the contention of the defendants that it would seem to be now too late to question it. In 1858 a suit of ejectment was brought by the owner of the fee in a turnpike road, which carried with it the public easement of the highway, against a defendant who was the tenant of a tollhouse built upon part of the highway. Other questions were involved, but Chief Justice Green, in delivering the opinion of the Supreme Court, said: "It is admitted that ejectment will lie by the owner of the soil for a part of the highway illegally appropriated by a third party to his own use. So the law is settled." The case went to this court afterward, and there was a reversal, but no opinion was filed. No question was raised, however, as to the propriety of the form of action, and the ejectment suit prevailed. See *State v. Laverack*, 34 N. J. L. 201; *Burnet v. Crane*, 56 N. J. L. 285, 28 Atl. 591, 44 Am. St. Rep. 395. In the latter case this court held that ejectment was an appropriate remedy for the owner of the fee against one who, having a right of way over the *locus in quo*, extended his fence and took exclusive possession thereof. In *French v. Robb*, 67 N. J. L. 260, 51 Atl. 509, 57 L. R. A. 956, 91 Am. St. Rep. 433, the abutting owner brought ejectment, to remove an electric light pole in the public street, used for private lighting. This court held in that case that the owner

of the soil in a street may maintain ejectment against any person wrongfully taking or claiming exclusive possession of the same. This doctrine is supported by the great weight of authority elsewhere. It was fully sustained in the early English case of *Goodtitle v. Alker*, 1 Burrow, 143. One of the questions was whether an ejectment will lie by the owner of the soil for land which is subject to passage over it as a King's highway, and the opinion recited that 1 Ro. Abr. 392, letter "b," pl. 1, 2, is express "that the King has nothing but the passage for himself and his people, but the freehold and all the profits belong to the owner of the soil. * * *" Lord Mansfield, speaking for the court, said, among other things: "There is no reason why the owner should not have a right to all remedies for the freehold, subject still, indeed, to the servitude or easement." The legal writers and the judicial decisions are found to be generally in accord with the doctrine here stated. In *Newell Ejectment* (1892), p. 31, the rule is stated thus: "It is a well-settled rule of law that the owner of land subject to an easement, servitude, or public use may recover the possession of land in an action of ejectment against a person wrongfully appropriating the same to a purpose wholly foreign to the easement or servitude. The rule applies to the public highways and the like, but in the action the land is recovered subject to the easement or servitude." The rule is similarly stated in 10 Am. & Eng. Encyc. of Law (2d ed.) 473, and the cases in support of the doctrine are fully collated there and in 17 Cent. Dig. 1978.

It is further contended by the plaintiffs in error that, granting the doctrine to be as stated, the occupancy of the street in this case was not exclusive or inconsistent with the public use, according to the meaning of the rule; that in fact the space between the rails was planked so as to admit the use of the highway by the public, except as to the small strip in the center of the street when the cars were actually running. But the answer to this is that such a use is an additional burden to the highway, and, unless supported by legislative authority, it does wrongfully appropriate a portion of the highway to a purpose foreign to the easement. In *Burlington v. Pennsylvania R. Co.*, 56 N. J. Eq. 259, 38 Atl. 849, affirmed in 58 N. J. Eq. 547, 43 Atl. 700, it was declared that a steam railroad laid longitudinally in a street is regarded as practi-

cally an exclusive appropriation of that part of the street which it occupies to a use inconsistent with the legitimate use of the street by the public. And in *Louisville & St. L. & T. Ry. Co. v. Liebfried*, 92 Ky. 407, 17 S. W. 870, it was held that, in a suit by the abutting owner, ejectment would lie against a railroad company appropriating the same to its permanent use without legislative grant, express or implied.

It is not contended that there was any error in the refusal to admit in evidence the city ordinance empowering the defendants to construct and operate the branch railroad in question. Such an ordinance would not be admissible in the absence of any legislative grant, or support the ordinance.

Under the evidence the plaintiff was entitled to a direction of the verdict in his favor, and hence there was no error in the rulings of the trial judge.

The same result is reached in No. 20, *George Rathacker v. Same Defendants*, and in No. 21, *Philip Wilson v. Same*; the three cases, involving the same questions, having been argued together.

The judgment in each of these cases is affirmed, with costs.

Other Cases in Supreme Court of New Jersey Not Reported in Full.

1. INJURY TO PASSENGER ALIGHTING¹ FROM CROWDED CAR BY SUDDEN STARTING OF CAR; CONTRIBUTORY NEGLIGENCE A QUESTION FOR JURY.— In the case of *Paganini v. North Jersey St. Ry. Co.* (N. J. Sup.), 57 Atl. 128, it appeared that the plaintiff, a passenger upon a crowded trolley car of the defendant, desiring to alight therefrom, and being unable to communicate with the conductor, because of the crowd, reached the motor-man, and he, in response to the request of the plaintiff, put on his brake and slowed down the car, whereupon the plaintiff, while the car was moving slowly, proceeded to step through the gate, which was open, and down upon the step, awaiting his opportunity to alight, when by a sudden jerk of the car he was thrown upon the ground, one foot going under the wheel, whereby he sustained serious injury. At the trial, these facts appearing, the court was requested to direct a verdict for the defendant

1. See note to *Champagne v. La Crosse City Ry. Co.*, *post*, p. 988.

on the grounds of contributory negligence, which request was refused by the trial judge. Upon review it was held that the action of the plaintiff did not constitute negligence *per se*, and whether he was negligent or not was a question for the jury, and that there was no error in the ruling.

2. **COLLISION WITH HOOK AND LADDER TRUCK AT STREET CROSSING; RIGHT OF WAY; EVIDENCE AS TO RIGHT OF WAY OF FIRE APPARATUS.**—In the case of *Knox v. North Jersey St. Ry. Co.* (N. J. Ct. of Er. & Ap.), 57 Atl. 423, it appeared that the plaintiff was the driver of a hook and ladder truck; that while driving to a fire a collision occurred between his truck and one of the cars of the defendant, in which he received injuries. The accident occurred at a street intersection. As the car approached the crossing it slowed down almost to a stop and then proceeded over the crossing at a slightly increased speed. The truck was proceeding along the intersecting street at a moderate speed. The car reached the crossing before the truck. The plaintiff, when he saw the car was proceeding over the point of intersection of the two streets, endeavored to avoid a collision by swinging his horses to the right, but, on account of the length of the truck, was unable to turn sharply enough to clear the car and struck it at the rear platform. The court held that the street car having reached the crossing first had the right to pass over first. This rule is a part of the common law and applies to vehicles of every character. The right of way of fire apparatus must exist either by virtue of legislative enactment, municipal ordinance, or local custom. It cannot be conferred by judicial decision. Where it is sought to raise the question as to the existence of a local custom evidence as to such custom is not admissible unless the plaintiff has alleged such existence in his declaration. A judgment directing a nonsuit was affirmed.

3. **COLLISION WITH PERSON LEADING HORSE 2 WHICH HAD BECOME UNMANAGEABLE FROM FRIGHT; NEGLIGENCE OF MOTORMAN IN FAILING TO STOP CAR.**—In the case of *Cameron v. Jersey City, Hoboken & Paterson St. Ry. Co.* (N. J. Ct. of Er. & App.), 57 Atl. 417, the plaintiff's intestate was killed by being struck by a car of the defendant while he was leading a horse in the street, which horse had become unmanageable from fright of the car. The car was moving at a good speed—some of the witnesses expressing it as a "high or terrific rate of speed"—upon the street where the motorman had a clear view ahead of him for several hundred feet. There was nothing to prevent the motorman from seeing that the cause of the fright of the horse was the approaching car. It was held that the motorman was negligent under such circumstances in not putting his car under such control as to be able to stop it, and to take all necessary precautions to that end. Under the evidence the jury was justified in finding that the motorman was not exercising the ordinary care and prudence which was required of him.

2. See note to *Lincoln Traction Co. v. Moore*, *ante*, p. 642.

South Buffalo Railway Co. v. Kirkover.

(New York — Court of Appeals.)

EMINENT DOMAIN;¹ MEASURE OF DAMAGES.—Where land is acquired by a railroad company without the consent of the owner, he is entitled to recover the market value of the premises actually taken, and also any damages resulting to the residue, including those which will be sustained by reason of the use to which the portion taken is to be put by the company.

APPEAL by plaintiff from an order of the Appellate Division, confirming the report of commissioners in condemnation proceedings. Decided October 30, 1903. Reported 176 N. Y. 301, 68 N. E. 366.

This is a proceeding brought by the railroad company under the Condemnation Law to acquire for its corporate purposes nearly eight acres of land owned by the defendants. Commissioners were duly appointed, who awarded the sum of \$10,500 for the land actually taken and the sum of \$41,500 as compensation for the damages "to the remainder of the parcel of land owned by said defendants, out of which the lands and premises described in said petition and order are taken, * * * caused by the taking of the land described in this proceeding, and the use thereof for railroad purposes in the manner and to the extent shown by the evidence and the proceeding aforesaid." * * * The Special Term confirmed this report, and the Appellate Division affirmed the order of the Special Term to that effect, with a divided court. From the order entered on this determination the present appeal is taken. The land sought to be acquired in this proceeding is a part of about sixty-nine acres of vacant land situated in the southerly portion of the city of Buffalo.

John G. Milburn and Frank Rumsey, for appellant.

Wilson S. Bissell and James McC. Mitchell, for respondents.

Opinion by BARTLETT, J.

The single question of law presented by this appeal is as to the rule which should govern the commissioners in awarding compensation for damages to the part of the tract of land not taken. The

1. As to right of street railway company to exercise power of eminent domain, see note to *Boyd v. Logansport R. & N. Tract. Co.*, 2 St. Ry. Rep. 193, (Ind.) 69 N. E. 398. As to damages occasioned by acquisition of right of way of street railway through farm lands, see *Cooke v. Boone Sub. Elec.*

counsel for the appellant railroad company insists that rule as to damages, in addition to those allowed for actually taken, may be thus stated: "Compensation allowed for such damages to the residue as are caused by the taking from it of the part taken, and (according to some cases) in estimating such damages the grade or elevation of the railroad may be taken into account as an element of damage." The learned Appellate Division in its opinion (Supp. 613) states the rule to be that the owner is entitled to recover the market value of the premises actually taken by the railroad company, and also any damages which result from the taking of a portion of his premises not taken, not only by reason of the loss of the property acquired by the railroad company, but also by reason of the use to which the property was put by the owner. It has been frequently pointed out in judicial opinions that there has been great conflict of authority in this State as to which of the rules above stated was best calculated to do justice between the parties. The early cases in the Supreme Court laid down the rule insisted upon by appellant's counsel. *Troy & Albany R. Co. v. Lee*, 13 Barb. 169; *Albany Northern R. Co. v. Lee*, 13 Barb. 69; *Canandaigua & N. F. R. Co. v. Payne*, 16 Barb. 16; *Matter of Union Village & Johnsonville R. Co.*, 53 Barb. 1; *Black River & M. R. Co. v. Barnard*, 9 Hun, 10; *Susquehanna R. Co. v. Dayton*, 10 Abb. Pr. (N. S.) 1; *Matter of Utica, C. & S. Valley R. Co.*, 56 Barb. 456, 1 Term held that, when land is taken for the construction of a railroad without the consent of an owner, compensation therefor is not limited to the actual value of the land taken, but includes the depreciation of the residue of the lot from which the land was taken by such separation; but the owner is entitled to recover any depreciation caused by the use to which it is applied. This case was followed in *Matter of N. Y. C. & H. R. R. Co.*, 56 Hun, 63, and *Matter of N. Y., Lackawanna & Western*

Ry. Co., 2 St. Ry. Rep. 258, (Iowa) 98 N. W. 293. As to right of a street railway to condemn the right of way of a steam railroad company, see *Indianapolis & V. R. Co. v. Indianapolis & M. R. T. Co.*, 1 St. F. Rep. (Ind. App.) 67 N. E. 1013. See also note, 1 St. Ry. Rep. 146. As to the determination of damages, see *Shimer v. Easton & Nazareth St. Ry. Co.*, 1 St. Ry. Rep. 714, and note, (Pa.) 55 Atl. 769.

29 Hun, 1. The tendency of judicial decisions in the Supreme Court has been in favor of the more liberal rule adopted by the court below in the case at bar.

Our attention has not been called to any case in this court where the question was presented under the precise state of facts disclosed by this record. In *Henderson v. N. Y. C. R. Co.*, 78 N. Y. 423, it was held that in a proceeding by a railroad corporation to acquire a right to lay its tracks in a street or highway, the fee of which is in the owner of the adjoining land, the proper compensation is: First. The full value of the land taken. Second. The fair and adequate compensation for the injury the owner has sustained and will sustain by the making of the railroad over his land; and for this purpose it is proper to ascertain and determine the effect the conversion of the street into a railroad track will have upon the residue of the owner's land. In *Newman v. Metropolitan Elevated Ry. Co.*, 118 N. Y. 618, 23 N. E. 901, 7 L. R. A. 289, Judge Brown (page 623, 118 N. Y., and page 902, 23 N. E.), uses this language:

"The principle upon which compensation is to be made to the owner of land taken by proceedings under the General Railroad Law has been frequently considered by the courts of this State, and the rule is now established, first, that such owner is to receive the full value of the land taken; and, second, where a part only of land is taken, a fair and adequate compensation for the injury to the residue sustained, or to be sustained, by the construction and operation of a railroad."

The case in which the learned judge wrote was one of that large class of elevated railway cases in the city of New York involving injury to the easements of light, air, and access, no land being taken. In *Bohm v. Metropolitan Elevated Ry. Co.*, 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344, Judge Peckham uses this language:

"Then, as to the land remaining, the question has been to some extent mooted whether the company should pay for the injury caused to such land by the mere taking of the property, or whether, in case the proposed use of the property taken should depreciate the value of that which was not taken, such proposed use could be regarded, and the depreciation arising therefrom be awarded as a part of the consequential damages suffered from the taking. I think the latter is the true rule."

The learned judge cites *Henderson v. N. Y. C. R. Co.*, 78 N. Y. 423, 433; *Newman v. Metr. El. Ry. Co.*, 118 N. Y. 618, 23 N. E. 901, 7 L. R. A. 289; *Matter of Brooklyn Elevated R. Co.*, 55 Hun, 165, 167, 8 N. Y. Supp. 78, adding: "The question might be of great importance where there was an injury to the remaining land; but, if there has been no injury, the inquiry as to the scope of the liability for damages is not material." This was also an elevated railroad case, involving only the injury to easements, and no land was taken. It may be true, as stated by appellant's counsel, that the precise question now presented has never been passed upon by this court. It is, however, equally true that the decisions in the Supreme Court and in this court tend strongly to the recognition of the more liberal rule.

Considering the principle involved, unembarrassed by legal decisions, it is reasonable that where the State, in the exercise of the right of eminent domain, sees fit to take the property of the citizen without his consent, paying therefor such damages as are the result of the taking, the commissioners in the condemnation proceedings should not only be permitted, but required, to award the owner a sum that will fully indemnify him as to those proximate and consequential damages flowing from this act of sovereign power. The exercise of the right of eminent domain is allowed upon the theory that, while the taking of property may greatly inconvenience the individual owners affected, it is in the interest and to promote the welfare of the general public. This being so, there is no reason why the citizen whose land is taken *in invitum* should suffer any financial loss that may be prevented by awarding him proximate and consequential damages. It may well be that in every case there are remote damages that the citizen, under the circumstances, must suffer. It not infrequently happens that some extensive public improvement, as the construction of a great reservoir in the vicinity of a large city like New York, drives families from old homesteads occupied for generations, and submerges the entire property. It is apparent that in such cases no reasonable and lawful rule of damages can fully compensate the landowners thus dispossessed. In the case at bar we have the ordinary and usual situation, where the commissioners have reported in favor of paying the owner the value of the land taken, and the damage to the balance by reason of the severance, and the use to which the prop-

erty taken is to be put by the railroad company. It is insisted on behalf of the appellant that the commissioners erroneously took into account as factors causing damage the use to which the property was to be put; that is, the operation thereon of a railroad, with its smoke, noise, dust, and cinders, and the embankment obstructions to the view. It is also argued that the elevated railroad cases in the city of New York are in a special category, and not applicable to the case at bar. In most of the elevated railroad cases the city owned the fee of the street, the railroad being erected therein by legislative grant, and the original question presented to this court was whether the injury suffered by the abutting owner to his easements of light, air, and access created a cause of action against the railroad company. It was held in the Story case, 90 N. Y. 122, 43 Am. Rep. 146, that these easements became at once appurtenant to the land, forming an integral part of the estate, and constituted property within the meaning of the State Constitution (art. 1, § 6), which prohibits the taking of private property without just compensation. It, therefore, followed that in the trial of the elevated railroad cases any evidence was competent tending to show injury to these easements of light, air, and access, as they were property. A similar rule of evidence is applicable to the case before us. The difference between the elevated railroad cases and this case is not material. In this case, as in the elevated railroad cases, one of the questions is as to the damages inflicted upon land not taken, and the inquiry is, to what extent does the use of the railroad on the adjacent property taken damage the property the fee of which remains in the defendants? This property is the land and its appurtenances. Any evidence tending to legally establish the amount of this damage is competent.

It is to be assumed that the commissioners appointed from time to time in condemnation proceedings are intelligent and competent men, anxious to do exact justice between the parties. It may be further assumed that they will judiciously discriminate between farm lands in the country and property located within the limits of a city, upon which dwellings and other structures may be ultimately erected. In the one case, under existing conditions, damages might be slight, while in the other very substantial. In

this case it is pointed out in the opinion of the learned Appellate Division that the average amount of damages to the property not taken was \$94,435, as fixed by nine witnesses called by the defendants, but the commissioners found the damages to be \$41,500. Attention is also called to the fact in the opinion that the average amount of damages fixed by plaintiff's witnesses was much less than the award. It appears by the report of the commissioners that on a number of days, by consent of counsel, they personally inspected the premises involved in this proceeding. We are of opinion that the rule of damages adopted by the commissioners was the proper one, and that the record discloses no legal error.

The order and judgment appealed from should be affirmed, with costs.

PARKER, C. J., and O'BRIEN, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

Order affirmed, with costs.

Binninger v. City of New York.

(New York — Court of Appeals.)

1. **RESOLUTION GRANTING FRANCHISE AS CONTRACT; MODIFICATION OF REQUIREMENTS AS TO STREET PAVING.**¹— A resolution of the common council of a city authorizing the construction and operation of a street surface railroad upon certain streets, and requiring as one of the conditions that the company keep in repair the pavement within its tracks and three feet on each side thereof is not a private contract between the company and the municipality and is subject to modification by a subsequent act of the Legislature. A common council cannot so grant the right to use the streets of a city as to deprive the city of all future control of the streets; a resolution under authority of statute may, therefore, be adopted requiring the pavement of a street through which the railroad runs with a different material than that specified in the original resolution, and may assess one-fourth of the cost thereof upon the railroad company.

1. An ordinance duly accepted granting a franchise to a public service corporation for the use of city streets constitutes a contract between such corporation and the city, binding upon both parties. *Baxter Springs v. Baxter Springs L. & P. Co.*, 8 Am. Electl. Cas. 125, 64 Kan. 591, 68 Pac. 63. In

2. EFFECT OF CONTRACT BETWEEN MUNICIPALITY AND PAVEMENT CONTRACTOR.

—A contract with a paving company to repave a street through which a railroad is constructed and operated, and to maintain such pavement in good condition to the satisfaction of the commissioner of public works of the city for the period of five years from the final completion and acceptance of the pavement relieves the street railroad company during such period from the obligation of keeping the street in repair as required by the original resolution granting its franchise.

3. PAVEMENT LEFT DEFECTIVE BY CONTRACTOR; LIABILITY OF RAILROAD COMPANY.—A street railroad company is not liable for injuries caused within such period of five years by an opening left in the pavement alongside the tracks of the company.

APPEAL by defendant from judgment in favor of the plaintiff. Decided January 12, 1904. Reported 177 N. Y. 199, 69 N. E. 390.

George L. Rives, Corporation Counsel (*James McKeen*, of counsel), for city of New York, appellant.

Charles A. Collin, *William F. Sheehan*, *John L. Wells*, and *Thomas L. Hughes*, for Brooklyn Heights Railroad Company, appellant.

Isaac M. Kapper and *Thomas E. Pearsall*, for respondent.

Opinion by BARTLETT, J.

The main question raised on this appeal by the defendant railroad company is, whether, on the undisputed evidence, it rested under any liability to keep the pavement in repair, within the

the case of *Philipsburgh Elec. L., H. & P. Co. v. Philipsburgh*, 8 Am. Electl. Cas. 149, 66 N. J. L. 505, 49 Atl. 445, it was held that a common council cannot repeal an ordinance granting permission to an electric light company to place its poles and stretch its wires on all the streets and alleys of the town, when the company has conformed to the conditions of the ordinance so far as required, and has expended money in placing the poles and wires on certain of the streets, although the common council may have been misled in passing the ordinance.

A municipality cannot recall or revoke an accepted franchise granted to a street railroad company after the company has in good faith begun to exercise its powers and perform its duties thereunder. *People v. Chicago, etc., Ry. Co.*, 118 Ill. 113, 7 N. E. 116; *Western Pav. & Sup. Co. v. Citizens' St. Ry. Co.*, 128 Ind. 525, 26 N. E. 188, 10 L. R. A. 770.

statutory limits, on Court street, between Fulton and Joralemon streets, in the borough of Brooklyn, or, whether the city of New York is solely liable. The city of New York insists that the railroad company is ultimately liable to pay the judgment which the plaintiff has recovered herein.

The plaintiff was injured December 29, 1900, by reason of driving into an opening negligently left in Court street, between Fulton and Joralemon streets, alongside the track of the defendant railroad company, whereby he was thrown to the pavement and severely injured. The jury rendered a verdict in favor of plaintiff and against both defendants for \$3,750, upon which judgment was entered and unanimously affirmed by the Appellate Division.

The first point raised by the railroad company is, that its paving obligations, as successor by lease of the Brooklyn City Railroad Company, were fixed by the franchise contract of the latter, the terms of which cannot be changed except with the consent of the contracting railroad company, its successors or assigns; that legislation changing this agreement in any respect would be unconstitutional as impairing the obligation of the contract.

It appears that the Brooklyn City Railroad Company constructed the railroad in question in the year 1854. The so-called franchise contract is a resolution of the common council of the city of Brooklyn, passed December 19, 1853, which recites that the various individuals named therein were the lowest bidders under the resolutions adopted by the common council on the 16th day of

The case of *Sioux City St. Ry. Co. v. Sioux City*, 78 Iowa, 742, 39 N. W. 48, was in some respects similar to the principal case. It there appeared that the Iowa Code, § 1090, provided that franchises of corporations created for pecuniary profit might be regulated or subjected to the imposition of such conditions as the General Assembly might deem best. A street railroad corporation organized under this law received a franchise from the city, authorizing it, on conditions with which it complied, to build a railway on its streets, and requiring it to pave between the rails. A subsequent act of the Assembly provided that street railway companies in certain cities should pave the streets between the rails and one foot on each side thereof, on being required to do so by a resolution of the council. It was held that the imposition of the additional burden of paving the one foot on each side of the tracks was not a violation of a contract, but an exercise of the reserved right of the Legislature.

the last preceding September, for constructing the various lines of railroads mentioned. It also recites that the persons named, and others associated with them, were duly incorporated under the Railroad Law of 1850, by the name of the Brooklyn City Railroad Company, for the purpose of constructing, maintaining, and operating said lines of railroad with a double track for public use in the conveyance of persons and property; also, that the railroad company desired the assent of the corporation of the city of Brooklyn to the construction, maintenance, and operation of the railroad. The resolution then follows, giving the assent of the city and the names of the various streets through which these railroad lines were to run, including the location involved in this action. This assent was given, subject to various conditions unnecessary to refer to in detail, as to the character of the track, roadbed, cars, rate of fare, and other matters.

The following was among the conditions named: "The pavement to be kept in thorough repair by said company within the tracks and three feet on each side thereof with the best water stone, under the direction of such competent authority as the common council may designate."

The articles of incorporation of the Brooklyn City Railroad Company, under the act of 1850, are not in evidence. We have only the resolution referred to and a brief exhibit which states that the Brooklyn City Railroad Company has leased to the defendant company, for a term of nine hundred and ninety-nine years, the street railroad on Court street, in the city of Brooklyn; also all franchises, rights, and assignments of whatsoever nature then or thereafter possessed or owned by the lessor. This lease is dated February 14, 1893.

In 1854 (chap. 140) the Legislature passed an act entitled "An act relative to the construction of railroads in cities," which provided, in substance, that the common council of cities should not thereafter permit to be constructed any street railroad without the consent thereto of a majority in interest of the owners of the property upon the streets in which such railroad is to be constructed being first had and obtained.

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tion of a license to use them to his benefit in an especial manner, he in effect contracts to perform that duty to the public in the place and stead of the municipality, and the way is given over to him for that purpose, and he takes it into his care and charge therefor, and his failure to perform his contract is a failure to do that duty, and the damages which naturally and proximately result from nonperformance, are all the damages which naturally and proximately fall upon the corporation from the duty not being performed."

It cannot be assumed that when the Brooklyn City Railroad Company, in the year 1853, for its own convenience in operating horse cars on its tracks, agreed to lay a pavement suitable for such purpose, that the municipality released control of the street for all future time as to the character of the pavement, as it possessed no such power. It appears that after many years the motive power was changed and the convenience and safety of the public required a different kind of pavement.

In *Milhou v. Sharp*, 27 N. Y. 611, this court decided that the powers of a municipal corporation, in respect to the control and regulation of its streets, are held in trust for the public benefit and cannot be abrogated nor delegated to private parties.

This court has recently recognized the principle in *Village of Mechanicville v. Stillwater & Mechanicville Street Railway Co.*, decided at the St. Lawrence Special Term in July, 1901, and reported in 35 Misc. Rep. 513. This case was affirmed in the Appellate Division (67 App. Div. [N. Y.] 628) and in this court (174 N. Y. 507) without opinions. The learned judge at Special Term stated:

"The defendant claims that a contract was made and a franchise given, specifying the kind of paving to consist of small stone between the rails and twenty inches outside, which could not be altered by the Legislature or by the requirements of the situation, and that chapter 494 of the Laws of 1901 (§ 1) ratifies pre-existing contracts with street railway companies in cities of the third class, towns or villages."

It appears that the two so-called franchises were given to the defendant and contracts made by it with the village in pursuance of the resolution of the trustees, each providing that the space between the rails and the space of at least twenty inches outside of the said rails on both sides of the tracks should be paved with small stone, and that the same should at all times be kept in good

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road is laid and operated) with asphalt pavement, pursuant to the provisions of chapter 1008 of the Laws of 1895. *Resolved*, that the district of assessment for such improvement be and the same is fixed on the property lying on and along the lines of said Court street, between Joralemon street and Fulton street, on each side of said Court street, between the points above specified, including the said railroad on said Court street, between Joralemon street and Fulton street, upon which district one-half of the cost of such improvement will be assessed pursuant to the provisions of said statute as follows: One-fourth of the cost of said pavement shall be assessed upon said railroad and one-fourth thereof on the other property benefited within the district of the assessment aforesaid."

On the 15th day of June, 1896, the report of the committee on grading and paving was made to the common council of the city of Brooklyn and was read in evidence. The material portion reads as follows:

"The Committee on Grading and Paving, to whom was referred the matter of *repaving* Court street, from Joralemon street to Fulton street, with asphalt pavement, pursuant to the provisions of Chapter 1008 of the Laws of 1895, report * * * *Resolved*, that this common council does hereby determine and decide to *repave* Court street, from Joralemon street to Fulton street, with asphalt pavement, pursuant to the provisions of Chapter 1008 of the Laws of 1895, and the said improvement is necessary and proper * * *."

Thereafter and on the 4th day of September, 1896, the city of Brooklyn entered into a contract with the Brooklyn Alcatraz Asphalt Company under said section 50 of the charter, as amended, by which the asphalt company agreed to lay the pavement in question, and to maintain the said work in good condition and to the satisfaction of the commissioner of public works for the period of five years from the final completion and acceptance thereof.

The defendant railroad company claims that by reason of these proceedings, under the charter, and by virtue of other provisions contained in that instrument, unnecessary to consider in detail at this time, it is relieved from liability.

There is no evidence in this record that the railroad company was assessed and paid its one-quarter of the tax to meet the expense of this *repaving*, but we are of opinion it must be assumed

for the purposes of this case that such was the fact, as it appears that the city of Brooklyn, by its contractor, the asphalt company, proceeded to *repave* Court street with asphalt in pursuance of the resolution of the common council, to which reference has been made.

It is argued while it may be admitted that the railroad company was relieved from all expense, other than the tax imposed upon it, for *repaving* Court street with asphalt, including the space between and alongside its tracks, that, nevertheless, it rested under the obligation to keep that pavement in repair, when completed, under section 98 of the Railroad Law.

This contention rests, in part, upon the somewhat technical point that the resolution of the common council, under which the city proceeded, referred only to *repaving*, and that the provision in the contract between the city and the asphalt company, requiring the latter to maintain its work in good condition for the period of five years from its final completion and acceptance, was not embraced within the municipal scheme.

We are inclined to a more liberal construction and hold that, as section 50 of the charter, as amended, contemplates raising money for repairing as well as repaving streets, the railroad company, during the five years succeeding the completion of the work by the asphalt company under its contract with the city, rested under no obligation to keep in repair the street within the statutory limits referred to in section 98 of the Railroad Law.

It must be assumed that the city discharged its duty and exacted from the railroad company its share of the expense for repaving and keeping in repair the street for five years, and it would be inequitable to impose upon the defendant company the obligation to repair, which, under ordinary circumstances, might rest upon it.

The railroad company as a taxpayer under this special assessment is entitled to every benefit secured by the city in its contract with the asphalt company.

There is no privity between the railroad company and the asphalt company, but the former having presumably paid its share of the tax for the expense of the work of repaving and

repairing, may assume that the city will see to it that all repairs are made during the term of its contract with the asphalt company.

If the asphalt company failed or refused to perform the city would, nevertheless, be liable, so far as the railroad company is concerned, to keep the pavement in repair until the expiration of the contract.

As the accident to the plaintiff occurred in December, 1900, it is apparent that the contract with the asphalt company was still in force, as the period of five years had not expired.

In view of the very imperfect condition of this record, concerning the transactions between the city and the railroad company in the premises, we express no opinion as to the legal situation which came into existence on the expiration of the contract with the asphalt company.

The city of Brooklyn is primarily liable in this action, and must pay the judgment recovered by the plaintiff.

The judgments and orders appealed from should be reversed and the complaint dismissed as to the defendant, The Brooklyn Heights Railroad Company, with costs against the plaintiff, and affirmed as to the city of New York, with costs to the plaintiff, to be paid by the city.

Opinion by PARKER, C. J.

I agree with Judge Bartlett's position, including his recommendation that plaintiff should pay costs to defendant railroad company.

There never has been any doubt of the liability of the city for plaintiff's injuries, so plaintiff could have proceeded against it with perfect safety and with reasonable confidence that if judgment was procured it could be collected from defendant city. But instead plaintiff chose to take the risk of making defendant railroad company also a party to the action, and quite likely for the reason that his counsel assumed that a larger verdict could be obtained against the railroad company and the city together than against the city alone. But whether that was the reason or not, he undertook to make an *unnecessary* party a defendant with some hope of benefit to plaintiff; and it having

turned out that it was *improperly* made a party, plaintiff should bear such portion of the responsibility for the error as the taxable costs constitute.

It is undoubtedly true, as this court holds in Conway's case, 157 N. Y. 33 — speaking of municipalities as to which there is no legislation to be regarded as modification of section 98 of the Railroad Law — that under that section "the duty of keeping such portion of the streets in permanent repair [by the railroad company] is not suggested or advised, but is commanded." But that section must be read in connection with local statutes, where there are any bearing upon the subject, as in the case in the city of New York. It would be absurd to read section 98 as applying to the railroads of the city, and to read the charter as affording an entirely independent proceeding, placing additional burdens upon the railroad company. Section 98 of the Railroad Law provides that the railroad company shall keep the streets in repair between the tracks and for two feet outside; and — inasmuch as it is held in Conway's case, *supra*, that the city authorities may determine that the entire street shall be repaved, and with asphalt, but that they may not impose upon the abutting owners the expense of repaving between the railroad tracks and for two feet outside — the burden of repaving that part of the street must be upon the railroad company under section 98.

So under that authority — if that section was the governing section when the street in question was repaved with asphalt — the railroad company would have been required to bear the cost of repaving between the tracks and for two feet outside, leaving the abutting owners to bear the rest of the expense. But the local authorities did not understand that section 98 controlled. They found a provision of the charter which requires the railroad company to pay 25 per cent. of the expense of repaving the streets, and the municipal authorities followed their charter, not section 98 of the Railroad Law; and they were right, because the charter is inconsistent with section 98, and should be construed as a modification of the general law, so far as the city of New York is concerned. Otherwise we should have the absurd result of treating the two statutes as cumulative, so far as they

concern the burdens of the railroad company as to street improvements — section 98 requiring the railroad to repave between the tracks and for two feet outside, and the charter requiring the railroad to pay 25 per cent. of the cost of repaving the entire street.

The general statute and the charter may be harmonized and read together so as to produce the result undoubtedly intended by the Legislature. And thus read, while the general duty to repair between the tracks and for two feet outside rests upon the railroad as between it and the city — a duty which the city may enforce — still in case the local authorities elect to repave the whole street, the charter provisions apply, and under them the city has full control of the matter of repaving, and may impose 25 per cent. of the cost upon the railroad company, and cannot impose more or less, notwithstanding the provisions of section 98, which within the city of New York do not apply when a repavement is made by the city.

Proceedings were taken under the charter to repave the street and to keep that repavement in repair for five years. The contract was to that effect, and the assessment made to meet the expense of such repavement included the amount necessary to keep the repavement in repair for five years.

Can any one deny that the city has the right to do this? Is it questioned that the extra expense of obtaining a contract that the repavement should be kept good for the period of five years is a proper expense, and one that may be collected out of those obligated to repave the street? I have heard no suggestion of doubt as to how these questions should be answered. For concededly the city has the right under its charter to make such a contract, and those charged with the expense of repaving must be bound to pay the extra cost of obtaining a contract to keep the repavement in repair for five years.

The municipal authorities, therefore, did precisely what they had the right to do, and having obtained a contract that the repavement should be kept in repair for five years, supported by a sufficient bond for faithful performance, the railroad company was relieved for that period from the duty of repairing in so far, at least, as ordinary wear and tear was concerned; for the city,

having full authority in the premises, had provided for ke the street between the tracks as well as elsewhere in repair had presumably collected the money needful therefor.

That the railroad company and the officials connected with highway department of the city recognized this to be the of what was done in connection with the repavement of the is shown by the letter written less than five months before accident by one of the railroad company's engineers to the engineer of highways, calling his attention to holes, one of which occasioned this accident. He said: "I believe the contractor under guaranty to keep this pavement in repair for five years. Will you kindly take steps to have the pavement put in better shape before there is any cause for a suit for damages?" This the principal assistant engineer of the highway department replied four days later: "The contractor this morning took a permit for repairing the same, and I presume the work was done at once. But the repairs were not actually made about five months thereafter — but within the period of five years covered by the contract — this accident happened. For it is the contractor who is responsible, and I believe — under the statutes which are referred to in detail in Judge Bartlett's opinion and in the dissenting opinion — it alone is responsible.

The judgment should be affirmed, with costs.

GRAY, O'BRIEN, J.J. (and PARKER, C. J., in opinion), concur with BARTLETT, J.; CULLEN, J., reads dissenting opinion; MARTIN, J., concurs; HAIGHT, J., absent.

Judgment accordingly.

People ex rel. Lehmaier v. Interurban Street Railway Co.

(New York — Court of Appeals.)

WRIT OF MANDAMUS AT INSTANCE OF PRIVATE INDIVIDUAL TO COMPEL ISSUE OF TRANSFER.—A peremptory writ of mandamus will not be granted upon the application of a private citizen to compel the issue of transfers as required by section 104 of the Railroad Law of New York.¹

1. As to issue and use of street car transfers, see monographic report of *City of Montpelier v. Barre & Montpelier Tract. Co.*, 2 St. Ry. Rep. (Vt.) 56 Atl. 278. See also the following cases reported in this

APPEAL by the relator from an order of the Appellate Division (reported 1 St. Ry. Rep. 616, 85 App. Div. [N. Y.] 407, 83 N. Y. Supp. 662), affirming an order of the Special Term denying a writ of mandamus. Decided January 29, 1904. Reported 177 N. Y. 296, 69 N. E. 596.

Edward B. Whitney, Henry B. B. Stapler, J. Aspinwall Hodge, George W. Kirchway, and Julius Henry Cohen, for appellant.

Charles F. Brown, Charles A. Collins, Paul D. Cravath, William F. Sheehan, and Henry A. Robinson, for respondent.

Opinion by O'BRIEN, J.

The relator in this case does not seem to have any grievance of his own, but, in behalf of the public, he applied for a peremptory writ of mandamus requiring the defendant to do certain things which he claimed it is by law bound to do. These things are (1) to carry for one single fare of five cents any passenger desiring to make one continuous trip in either direction between any point on the Eighth avenue line owned by the Eighth Avenue Railroad Company, and any point on the One Hundred and Twenty-fifth street line, owned by the Third Avenue Railroad Company; and (2) upon demand, and without extra charge, to give to each passenger upon either of said lines, paying one single fare, a transfer at the intersection of said lines, at the corner of Eighth avenue and One Hundred and Twenty-fifth street, entitling such passenger to make a continuous trip from any point on one line to any other point on the other line. The court at Special Term denied the application for the writ, and the order to that effect was unanimously affirmed on appeal. There are two questions presented by the record: One is whether the defendant is under legal obligation to give the transfers specified, and this depends upon the

Indiana Ry. Co. v. Hoffman, 2 St. Ry. Rep. 198, (Ind.) 69 N. E. 399; Rosenberg v. Brooklyn Hts. R. Co., 2 St. Ry. Rep. 807, 91 App. Div. (N. Y.) 580, 86 N. Y. Supp. 871; Garrison v. United Rys. & Elec. Co., 1 St. Ry. Rep. 267, and note, (Md.) 55 Atl. 371; Blume v. Interurban St. Ry. Co., 1 St. Ry. Rep. 569, 41 Misc. Rep. (N. Y.) 171, 83 N. Y. Supp. 989; Memphis St. Ry. Co. v. Graves, 1 St. Ry. Rep. 760, (Tenn.) 75 S. W. 729.

construction of certain sections of the Railroad Law — particularly section 104 (Laws 1892, p. 1406, chap. 676). The other question is, assuming that there is a statutory obligation on the part of the railroad company to give transfers to passengers, such as are specified in the application, whether that duty can be enforced by mandamus.

To state the case in another way, the question presented by this appeal is whether this court has the power to compel the courts below to enforce this statutory obligation, if it exists, by mandamus. That would be the plain effect of a decision of this court reversing the orders of the courts below, since these courts would be obliged to proceed upon the relator's motion and render such judgment as this court may determine should be given in the case. The writ of mandamus is issued only when there is a clear legal right to be enforced, and when there is no other adequate or legal remedy to obtain the relief sought. *People ex rel. Gas Light Co. v. Common Council of Syracuse*, 78 N. Y. 56; *People ex rel. Millard v. Chapin*, 104 N. Y. 96, 10 N. E. 141. If the right of the relator to the writ is not clear, or if there was some other adequate legal remedy more appropriate to the case, then the relator had no absolute right to the writ; and, if the courts below were of the opinion that it was inexpedient to grant it under the circumstances, then this court has no right to interfere. It should be observed here that decisions of this court are to be found, made prior to the enactment of the present Constitution, which hold, in effect, that in certain cases it would review an order of the courts below denying the application for a writ of mandamus, even where it was discretionary, or where the discretion of the court below had been abused. If these cases are carefully examined, it will doubtless be found that they were decided at a time when by statute and by the Constitution of the State the jurisdiction of this court was different from what it is now. Since the enactment of the present Constitution the jurisdiction of this court in such matters has been very much abridged. The right of review here of any judgment or order is limited to questions of law, and it has ordinarily nothing to do with questions of discretion or with questions of fact. There may be some cases where the

peremptory writ of mandamus is given as a legal right, but obviously in this case the nature of the relief sought is such, and the other legal remedies available to the relator are such, that it would seem to be plain that mandamus is not the proper remedy.

In the first place, if it be true that the railroad company is violating the statute in refusing the transfers, then an action for a penalty of \$50 will lie in favor of any individual who has been refused, and also an action to recover any damages which the individual may have sustained in consequence of the illegal refusal. A vigorous application of the statutory right to recover penalties has generally been found to be an adequate remedy for the grievance of which the relator complains. But in addition to that the attorney-general is authorized to bring an action against a railroad company to vacate its charter for any violation of law of which it is guilty, and a refusal to obey a statute to give transfers in certain cases would doubtless bring the defendant corporation within the scope of that statute. Code Civ. Proc., §§ 1785, 1798. Sections 157 and 162 of the Railroad Law (Laws 1890, pp. 1129, 1131, chap. 565) prescribe remedies for a redress of the grievance of which the relator complains that would seem to be ample. It is there provided that the railroad commissioners shall have power to investigate all complaints of any neglect of duty on the part of railroad companies in the operation of their roads for the accommodation of the public, and to make report upon all complaints of the public in regard to the violation of its charter obligations, and it is provided that any decision or recommendation of the board may be enforced by mandamus. Here the writ of mandamus is expressly given as a remedy, but not in the first instance, and only after investigation of the facts by the public authorities in charge of the affairs of railroads. In the present case the relator, as has already been stated, has shown no legal right in himself. So far as the public is concerned, and so far as any individual may acquire such a right, the law gives adequate legal remedies. In this state of the case it was, as it seems to me, a matter of discretion with the Supreme Court to withhold the writ. It may have had the power to issue it, but it may have been of the opinion that such a proceeding was inexpedient or inappropriate.

The practical question is whether this court in such a case can or ought to hold that the courts below committed an error of law in refusing to grant the writ. The proper function of the writ of mandamus is to compel the doing of a specific thing, based upon a legal right. It does not require much argument to show that the writ of mandamus is not, in this case, an appropriate remedy to compel a general course of official conduct or a long series of continuous acts, as it is impossible for the court to oversee the performance of such duties. The relief which is sought to be attained by this application affects a multitude of people who may become passengers upon the railroad from time to time in the future, and the act which the defendant is required to perform is to deliver to all these people transfer tickets entitling them to ride upon the defendant's cars. It is difficult to see how a return to the writ, if issued, could be enforced, or how the final judgment could be executed, under section 2073 of the Code.

It seems to me that an absolute right to a writ of mandamus by the relator, representing, as he claims, the whole public, to procure the relief demanded, is not sanctioned by any clear authority, but, on the contrary, the more recent decisions of this court are adverse to the relator's claim. *People ex rel. Linton v. B. H. R. Co.*, 172 N. Y. 90, 64 N. E. 788; *People ex rel. Pumpyansky v. Keating*, 168 N. Y. 390, 61 N. E. 637.

The law with respect to the right of this court to review the order of the court below refusing a writ of mandamus is now, I think, well settled upon a very fair and reasonable basis; and that is that the application for the writ is addressed to the sound discretion of the Supreme Court, and, where it appears that the facts are such as to justify the court in refusing the writ as matter of discretion, this court will not interfere, unless it affirmatively appears in the order denying the writ that the court did not refuse the writ in the exercise of its discretion. *Matter of Hart*, 159 N. Y. 284, 54 N. E. 44; *People ex rel. Durant L. I. Co. v. Jeroloman*, 139 N. Y. 14, 34 N. E. 726; *People ex rel. Jacobus v. Van Wyck*, 157 N. Y. 495, 52 N. E. 559. It does not appear from the order which is the subject of this appeal that the courts below refused to grant the application for want of power, or upon any other question of law.

It follows that the case is not reviewable in this court, and, therefore, the appeal must be dismissed, with costs.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, and CULLEN, JJ., concur.

Appeal dismissed.

Stillings v. Metropolitan Street Railway Co.

(New York — Court of Appeals.)

COLLISION WITH PEDESTRIAN CROSSING TRACK TO TAKE A CAR; CONTRIBUTORY NEGLIGENCE.—The plaintiff's intestate was struck by one of the defendant's cars while attempting to cross the track, diagonally, to take a car that was waiting at a crossing. The conductor of the waiting car called to them to hurry up if they wanted to get on that car. The decedent in crossing the track was facing the approaching car which struck him. Upon the theory that the call of the conductor to hurry up may have momentarily diverted the decedent's attention from the approaching car, it was held that the decedent was not guilty of contributory negligence as a matter of law, and that the question as to whether or not he was so guilty was a question of fact for the jury.

APPEAL by defendant from judgment of the Appellate Division modifying a judgment for the plaintiff. Decided February 9, 1904. Reported 177 N. Y. 344, 69 N. E. 641.

Charles F. Brown, Bayard H. Ames, and Henry A. Robinson,
for appellant.

Archibald C. Shenstone, for respondent.

Opinion by HAIGHT, J.

This action was brought to recover damages for the alleged negligent killing of the plaintiff's testator. On January 7, 1899, at about midnight, the decedent, a man seventy-three years of age, with a companion, was at the southwest corner of Central Park West and Sixty-ninth street, intending to take a north-bound car

On the defendant's road. The car was then approaching from Sixty-eighth street, and was signaled to stop by the decedent's companion; and they started diagonally across the street toward the northeast corner, where the cars stopped to receive and discharge passengers. They had proceeded as far as the south-bound track when the north-bound car passed them, and stopped at the crosswalk. The conductor then called to them to hurry up, if they wanted to get on that car. An instant later a south-bound car, running at a speed of from twenty to twenty-five miles per hour, struck and killed the decedent. His companion testified, in substance, that they saw the south-bound car approaching from Seventy-first street before leaving the southwest corner of Sixty-ninth street; that, in proceeding diagonally across the street, he led the way, the decedent walking four or five feet behind him, and that, as the decedent stepped upon the south-bound track, he called to him to look out for the car; and that he attempted to avoid it by a backward movement, but was struck and killed.

The defense interposed is that of contributory negligence, and the contention of the appellant is that such negligence appears, as a matter of law, and that a verdict should have been directed for the defendant. It must be conceded that the question presented is upon the border line, and that ordinarily a person could not walk diagonally across a street, facing an approaching car, and colliding therewith, without becoming chargeable with contributory negligence; but in this case we have finally concluded to sustain the trial court in submitting the case to the jury, not, however, upon the theory that the call of the conductor to hurry up was such an invitation as would justify the decedent in the belief that his access to the car was thereby rendered safe, and that he was excused from looking out for the approaching south-bound car, but upon the ground that the call of the conductor may have momentarily diverted his attention therefrom, and that the loss of time occasioned thereby prevented his escape, and resulted in his death. This, taken in connection with the other circumstances disclosed in the case, including the decedent's probable deception as to the speed of the south-bound car, and his right to suppose that the motorman would have it under control as he approached the

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APPEAL by plaintiff from a judgment of the Appellate Division affirming a judgment for the defendant entered on the dismissal of the complaint. Decided March 15, 1904. Reported 178 N. Y. 50, 70 N. E. 98.

John H. McCrahon, for appellant.

Charles E. Spencer, for respondent.

Opinion by O'BRIEN, J.

The plaintiff sought to recover damages for a personal injury that he claimed to have sustained in consequence of the falling upon him of a guy or stay wire, being a part of the defendant's overhead trolley system for operating its railroad. One end of the wire, which was about 120 feet long, was attached to the top of a pole, and the other end was attached to the main trolley wire. There is no dispute about the fact that this wire broke near the point where it was connected with the trolley, and at least 100 feet of it fell into the street below, a distance of about twenty-two

pedestrians caused by such conditions, unless it fails to remedy the defects within a reasonable time after actual or constructive notice thereof. *Ludwig v. Metropolitan St. Ry. Co.*, 71 App. Div. (N. Y.) 210, 75 N. Y. Supp. 667.

As to liability for injuries to travelers in streets and highways caused by electric wires therein, see note to *Ela v. Postal Telegraph & Cable Co.*, 8 Am. Electl. Cas. 427. See also *Memphis St. Ry. Co. v. Kartright*, 1 St. Ry. Rep. 763, (Tenn.) 75 S. W. 719; *Economy L. & P. Co. v. Hiller*, 8 Am. Electl. Cas. 462, 203 Ill. 518, 68 N. E. 72; *Chaperone v. Portland Gen. Elec. Co.*, 8 Am. Electl. Cas. 468, 41 Oreg. 39, 67 Pac. 928; *Herron v. City of Pittsburgh*, 8 Am. Electl. Cas. 482, 204 Pa. St. 509, 54 Atl. 311; *Wehner v. Lagerfelt*, 8 Am. Electl. Cas. 486, 27 Tex. Civ. App. 520, 66 S. W. 221; *Gloucester Elec. Co. v. Kankas*, 8 Am. Electl. Cas. 493, 120 Fed. 490.

In the case of *Neal v. Wilmington, etc., Elec. Ry. Co.*, 3 Penn. (Del.) 467, 53 Atl. 338, it appeared that the plaintiff's intestate was killed by coming in contact with a guy wire supporting an electric trolley pole which had fallen and become charged with electricity. The rule was laid down in this case that a traveler on a highway is entitled to assume that it is reasonably safe, and while required to use reasonable care and caution to avoid danger, is not required to search for obstructions and dangers therein; that where the proximate cause of the death of the plaintiff's intestate was the defendant's negligence in permitting a guy wire to fall into a street and become charged with electricity, it was immaterial that the negligence of some third person might have contributed to the accident.

As to the doctrine of *res ipsa loquitur*, as applied to live wires in streets, see note, 8 Am. Electl. Cas. 481.

feet. The plaintiff testified that he was at that moment riding on a bicycle through the street, underneath the wire, and that it fell upon him, coiled around his body, and communicated what he called a shock of electricity to him, which affected his heart and nervous system. The plaintiff's testimony was in many respects corroborated by other witnesses. The proof tended to show that the plaintiff was subjected to considerable physical suffering in consequence of the accident, but whether the injuries claimed to have been sustained were temporary or permanent does not appear from the proofs.

At the close of all of the testimony the learned trial judge granted a motion made by the defendant's counsel for a nonsuit, and to this ruling the plaintiff's counsel excepted. He also asked that the whole case made out by the evidence be submitted to the jury, which request was refused and an exception was taken. The case, therefore, presents the familiar question whether the plaintiff produced at the trial any evidence which he was entitled to have weighed and considered by the jury. There can, I think, be no doubt that the plaintiff's testimony, if believed, or, rather, if at all credible, tended to establish the cause of action stated in the complaint. The plaintiff has been nonsuited, and the judgment of nonsuit has been affirmed at the Appellate Division, on the sole ground that the facts to which he and his witnesses testified at the trial were utterly incredible, and in fact scientifically and physically impossible. It is upon that ground that the learned counsel for the defendant attempts to sustain the judgment in this court. The fact that the overhead wire attached to the defendant's trolley system fell at the time and place claimed, and came in contact, at least to some extent, with the plaintiff's person, was clearly established; but it was said that a stay or guy wire, one end of which was detached from the trolley, and the other end attached to a pole, could not possibly have communicated a current of electricity to the plaintiff's body. We are not able to understand how such an occurrence could have happened, but this court is not the judge of the credibility of testimony. We have frequently had occasion, in cases of accidents upon electric railways, to try and fathom some of the unaccountable freaks of electricity. We know that there are many things concerning its action that are imperfectly understood. What it does or may do under a given state of circum-

stances is perhaps not yet accurately known. It may be that the plaintiff's claim that he felt a shock of electricity when the wire coiled around his body was purely imaginary; but, if he tells the truth as to what followed, and the effect which the accident had upon him, there can be no doubt that in some way and from some cause he sustained bodily injuries. What the extent of these injuries was, and whether they were real, or in some degree feigned, was a question for the jury. If the plaintiff's testimony as to the circumstances attending the injury is incredible and impossible, it is as easy to expose the falsity and to demonstrate the truth before the jury as it is before the court.

All we mean to say is that the credibility and the weight to be given to the plaintiff's testimony should have been determined by the jury. It is not a very unusual thing for this court to feel constrained to affirm judgments in such cases where large recoveries have been had upon testimony quite as incredible as that of the plaintiff in this case. Moreover, it frequently happens that cases appear and reappear in this court, after three or four trials, where the plaintiff on every trial has changed his testimony in order to meet the varying fortunes of the case upon appeal. It often happens that his testimony upon the second trial is directly contrary to his testimony on the first trial, and, when it is apparent that it was done to meet the decision on appeal, the temptation to hold that the second story was false is almost irresistible. Yet in just such cases this court has held that the changes and contradictions in the plaintiff's testimony, the motives for the same, and the truth of the last version, is a matter for the consideration of the jury. *Williams v. Del., L. & W. R. Co.*, 155 N. Y. 158, 49 N. E. 672. If this court is to be consistent with the position taken in that case, and in many other cases of like character, we cannot hold, as matter of law, that there was no proof in this case to sustain the plaintiff's cause of action. It often happens that science and common knowledge may be invoked for the purposes of demonstrating that a particular statement in regard to some particular accident must be absolutely false. In such cases the question is for the court. But in cases of doubt we think it is wiser and better to remit such controversies to the proper tribunal for settling facts and ascertaining where the truth lies, rather than assume the power to determine the facts ourselves. This is an old rule, and while,

like all other rules, it may work hardship or injustice in a particular case, it is wiser to adhere to it. *McDonald v. Metropolitan Street Ry. Co.*, 167 N. Y. 66, 60 N. E. 282; *Place v. N. Y. C. & H. R. R. Co.*, 167 N. Y. 345, 60 N. E. 632; *Hoffman House v. Foote*, 172 N. Y. 350, 65 N. E. 169.

The judgment should be reversed, and a new trial granted, costs to abide the event.

BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, J.J., concur.
PARKER, C. J., absent.

Judgments revised, etc.

N. Y. C. & H. R. R. Co. v. Auburn Interurban Electric R. Co.

(New York — Court of Appeals.)

EXTENSION OF STREET RAILROAD; CERTIFICATE AS TO PUBLIC CONVENIENCE AND NECESSITY.—Under section 59a of the Railroad Law, as inserted by Laws 1902, chap. 226, no extension of a street surface railroad that will be practically parallel with another railroad already constructed and in operation can be made without a certificate from the board of railroad commissioners as to public convenience and necessity. Prior to the enactment of that section a street surface railroad could extend its lines under section 90 of the Railroad Law without such certificate. So where a street surface railroad company incorporated in 1895 had filed a statement in 1901 under section 90 for a proposed extension of its line, the provisions of the said section 59a do not apply.

APPEAL by plaintiff from a judgment of the Appellate Division affirming a judgment in favor of the defendant. Decided March 15, 1904. Reported 178 N. Y. 75, 70 N. E. 117.

Frank Hiscock, Thomas Emery, and Ira A. Place, for appellant.

George Barron, for Skaneateles Railroad Company.

William Nottingham, for respondent.

Opinion by WERNER, J.

This action was brought to restrain the defendant from constructing and operating an alleged proposed extension of its street surface railroad between the village of Skaneateles and the city of

Syracuse, in the county of Onondaga. The complaint was framed upon the theories: (1) That the alleged extension was invalid, because the defendant had failed to obtain from the board of railroad commissioners a certificate that public convenience and necessity required it; and (2) that the so-called extension was such only in name, and was in reality a new road, the construction and operation of which was illegal without such certificate. These allegations of the complaint were met by the denials of the answer, and upon the issue thus joined and the proofs made the defendant was given a judgment, which has been affirmed by the Appellate Division.

The appellant now contends that the findings of fact and conclusions of law of the learned trial court do not support the judgment, because the allegations of the complaint and the evidence given in support thereof tend to prove the construction and operation of a proposed extension between Skaneateles and Syracuse, while the only findings and conclusions upon the subject are to the effect that a *bona fide* extension was projected and made between Skaneateles and Marcellus. Of this contention it is enough to say that there is evidence to support the findings and conclusions made, and these are sufficient to sustain the judgment rendered, unless the main contention of the plaintiff as to the construction of sections 59 and 90 of the Railroad Law (Laws 1895, pp. 317, 791, chaps. 545, 933) is upheld, in which event the judgment must, of course, be reversed, without regard to the evidence or the findings of fact based upon it.

The failure of the trial court to find certain facts which the appellant claims to have established by evidence is not, in the present state of this record, an error of law reviewable by this court (*National Harrow Co. v. Bement & Sons*, 163 N. Y. 505, 57 N. E. 764); and, if there is any evidence to support the findings of fact actually made, the result in that regard is binding upon this court, even though a different conclusion should or might have been reached in the courts below (*Ostrom v. Greene*, 161 N. Y. 363, 55 N. E. 919). In the last analysis, therefore, the only question that we can review is whether the extension of defendant's road, projected and constructed as found by the trial court, was valid under the statute, without the certificate of the board of railroad commissioners as to the public convenience

and necessity thereof. The defendant was organized in 1895 for the purpose of constructing an electric street surface railroad over certain routes described in its charter. One of these routes extended from a given point in the city of Auburn, in the county of Cayuga, over and along stated courses to the intersection of Genesee street with the easterly boundary of the village of Skaneateles, in the county of Onondaga. The defendant had complied with the then existing requirements of section 59 of the Railroad Law (Laws 1895, p. 317, chap. 545), which, among other things, provided that "no railroad corporation hereafter formed shall exercise the powers conferred by law upon such corporations or begin the construction of its road * * * until the board of railroad commissioners shall certify that * * * public convenience and a necessity require the construction of said railroad as proposed in said articles of association." The route above referred to was one of the routes specified in the defendant's articles of association. At the time of the commencement of this action the defendant had constructed and was operating about six and one-half miles of its road over that route, from the point of its beginning in the city of Auburn to a point in Genesee street at or near its intersection with Jordan street in the village of Skaneateles, and was about to begin the construction of the remainder of its road along Genesee street from its intersection with Jordan street to the easterly boundary of the village of Skaneateles. After the completion of its road along this route, and on the 2d day of October, 1901, the defendant made and filed a statement and certificate of a proposed extension of its road from its easterly terminus in the village of Skaneateles, easterly along specified courses for a distance of about six miles to the village of Marcellus, in the county of Onondaga. This statement and certificate complied in all essential particulars with section 90 of the Railroad Law (Laws 1895, p. 791, chap. 933), which provides that: "Any street surface railroad corporation, at any time proposing to extend the road or to construct branches thereof, may, from time to time, make and file in each of the offices in which its certificate of incorporation is filed, a statement of the names and descriptions of the streets, roads, avenues, highways, and private property in or upon which it is proposed to construct, maintain or operate such extensions or branches." Upon filing

any such statement and upon complying with the conditions set forth in section 91 of the Railroad Law (Laws 1901, p. 1529, chap. 638, which relates to the consents of the local authorities and adjoining property-owners in cities and villages), "every such corporation shall have the power and privilege to construct, extend, operate and maintain such road, extensions or branches, upon and along the streets, avenues, roads, highways and private property named and described in its certificate of incorporation or in such statement."

The courts below have held that section 59 of the Railroad Law, as it stood in 1901, had no application to proposed extensions of then existing street surface railroads, and that it was not necessary for the defendant to apply to the board of railroad commissioners for a certificate of public convenience and necessity for the extension of its road above referred to. We concur in that construction of the statute. The history and the language of section 59 very clearly indicate the legislative purpose behind its enactment. When it first became a part of the Railroad Law in 1892, street surface railroads were expressly exempted from its provisions. Thus it stood until 1895, when that exemption was removed. In plain and unequivocal language it referred only to new railroads to be constructed by railroad corporations thereafter to be formed. In 1902 it was amended (§ 59a, Laws 1902, p. 610, chap. 226) by providing that "any street surface railroad company which proposes to extend its road beyond the limits of any city or incorporated village by a route which will be practically parallel with a street surface railroad already constructed and in operation shall first obtain the certificate of the board of railroad commissioners that public convenience and a necessity require the construction of such extension as provided in the case of a railroad corporation newly formed." During the whole of the period from 1890, when the present Railroad Law was originally enacted, down to 1902, when section 59 was so amended as to bring proposed extensions of street surface railroads within the rule requiring the certificate of the board of railroad commissioners as to public convenience and necessity, section 90 has also been a part of the same law, and, although amended in 1893, and again in 1895, its substance has remained unchanged, and it has always dealt exclusively with

extensions and branches of street surface railroads. Thus we see that in 1890, when newly projected street surface railroads were concededly exempted from the changed policy of the State toward its steam railroads, as manifested in section 59 of the Railroad Law, the statutory provision (§ 90) for extensions of street surface railroads was, in effect, the same as in 1895, when new street surface railroads were placed upon the same footing as new steam railroads, and this was the condition of the statute down to 1902 when section 59 was amended as above stated.

The reasons for this difference in the earlier legislative treatment of the two kinds of railroads are obvious. Under the law as it stood prior to 1890 the requisite number of persons with sufficient capital could organize a railroad corporation and construct a railroad at any time and over any route they might choose. In the formative period of our State this was doubtless a most beneficent policy and contributed very materially to the development of our commerce and resources. Experience, however, demonstrated that railroad enterprises are not exceptions to the ordinary trade laws of supply and demand. Ill-advised and speculative railroad enterprises soon emphasized the necessity of protecting not only existing railroad corporations against destructive competition, but the investing public against the disastrous consequences of indiscriminate and unrestricted railroad schemes backed by alluring but impracticable promise of gain. These were the conditions which brought about the enactment of section 59 as part of the Railroad Law. The reasons for then exempting street surface railroads from its operations are equally apparent. At that time street surface railroads were operated by horse power, chiefly in the larger cities, and they were comparatively few in number. With the advent of electricity as a motive power new conditions were created. Not only was urban traffic greatly augmented, but interurban street surface railroads were projected on every hand, until the history of steam railroads found its counterpart in this new outlet for corporate enterprise and capital. In 1895 the Legislature again interposed — this time in favor of existing street surface railroads and the investing public — by striking out of section 59 the exemption in favor of street surface railroads, thus placing all railroads of every kind thereafter to be projected upon precisely the same footing.

That this amendment of section 59 was not quite far-reaching enough has been made evident by later developments and legislation. After the legislation of 1895, section 90 of the Railroad Law still gave practically unlimited power to extend existing street surface railroads. Under this power long interurban lines could be constructed by means of successive extensions, and existing lines could be paralleled by the same methods. To remedy this new phase of an old evil, section 59a was enacted in 1902, and, as the law now stands, no street surface railroad corporation can extend its road beyond the limits of any incorporated city or village, if the effect of such extension will be to practically parallel any existing street surface railroad, without first obtaining from the board of railroad commissioners a certificate that public convenience and a necessity require such extension.

The construction of sections 59 and 90 of the Railroad Law, supported by their language and history, is re-enforced by several incidental considerations. While it is true that these sections must be read together, it is equally true that such a reading is useful only so far as the two sections relate to precisely the same subject. Originally, section 59 had reference only to steam railroads, and section 90 has always dealt exclusively with street surface railroads. The Railroad Law has never permitted the extensions of steam railroads, while it has always provided for extensions of street surface railroads. The same legislative policy which in 1890 applied the provisions of original section 59 to steam railroads, excluded street surface railroads from its operation, and, as that section related only to newly projected railroads, it is clear that the mere excision in 1895 of the exemption in favor of street surface railroads had no other effect than to place the latter upon exactly the same footing with the former. Sections 59 and 90 were, therefore, entirely independent of each other until 1902, when the Legislature again announced a change of policy, not as to railroads generally, but only as to extensions of street surface railroads as expressed in section 59a, which for the first time brought sections 59 and 90 into relations with each other. All this is supplemented by the practical construction that has been given to these sections by the board of railroad commissioners and by the Legislature. The former, in its annual reports of 1897, 1898, and 1899, very pointedly called attention to the

need of amendatory legislation in respect of street surface railroad extensions; and the latter, in 1902, adopted the recommendations therein made by the enactment of section 59a. Much might be said as to the far-reaching effect of this practical construction, and the legal weight which should be given to it, but, since it is in perfect accord with our own view of the statute, we deem it unnecessary to further extend the discussion.

The judgment should be affirmed, with costs.

PARKER, C. J., and O'BRIEN, MARTIN, and VANN, JJ., concur;
GRAY, J., not sitting; BARTLETT, J., taking no part.

Judgment affirmed.

Paige v. Schenectady Railway Co.

(New York — Court of Appeals.)

1. **USE OF STREET BY ELECTRIC STREET RAILWAY.**¹—The use of a city street for the purposes of a street surface railroad operated by electric power imposes an added burden upon the property rights of the owners of the fee of the street, and such owners are entitled to restrain the operation of a railroad in such street unless they have consented thereto.
2. **CONSENTS OF ABUTTING OWNERS NOT TO BE ABANDONED.**²—Consents once granted by abutting owners cannot be withdrawn after the road is constructed at the will of the owner where there was no contract to that effect, no consent by the State or general public, or by the stockholders of the company, and no consideration therefor. The abandonment of the portion of the road to which the consents attached by a receiver of the company appointed in proceedings for the foreclosure of a mortgage, under an order limiting its authority to the management, operation, and protection of the company's property, cannot affect the rights acquired under such consents. The street being occupied under a public franchise cannot be abandoned without the consent of the State, the company, and its stockholders, and the consents of abutting owners will

1. As to street surface railroad as additional servitude upon property of abutting owners, see monographic note to 1 St. Ry. Rep. 528.

2. As to the validity, sufficiency, and execution of consents, see *Mercer County Traction Co. v. United N. J. R. & C. Co.*, 1 St. Ry. Rep. 528, (N. J.) 54 Atl. 819. As to revocation of consents when once duly executed, see *Paterson & S. L. Tract. Co. v. Wostbrock*, 2 St. Ry. Rep. 711, (N. J. Eq.) 56 Atl. 653.

survive the reorganization of the company and pass to its successor in title. The fact that the successor company attempted to obtain the consent of the abutting owners to a reconstruction of that part of its railway which had been abandoned does not forfeit or impair its rights acquired under the original consents.

3. **INJUNCTION RESTRAINING OPERATION OF ROAD BY NONCONSENT OF THE OWNER.**—Where a strip of land outside the original street was acquired by the city under condemnation proceedings, and the street was widened, an abutting owner who owned the fee to the center still holds the fee to that portion of the land lying between the center of the street and the former boundary thereof, and where such owner did not consent to the construction of the railway over his premises, he is entitled to an injunction restraining the operation of the road over that portion, although its value can be little more than nominal.

APPEAL by defendant from judgments of the Appellate Division affirming judgments enjoining the defendant from operating its railway in a street in front of the premises of each of such plaintiffs. Decided March 15, 1904. Reported 178 N. Y. 102, 70 N. E. 213.

The trial judge made a short decision in each action, and also made findings of fact, and directed the same to be attached to the decision therein. The Schenectady Street Railway Company, the predecessor of the defendant, obtained the consent of the local authorities of the city of Schenectady and the consent of the necessary number of abutting owners to the construction of a street railway in Washington avenue, in that city. The plaintiffs Paige, Whitmyre, and the predecessor in title of the plaintiff Thompson were among the property-owners who consented to its construction. In September, 1891, after the railway on Washington avenue had been completed and was in operation, the company executed a mortgage upon its property and franchises, including the Washington avenue portion of its road, to the Central Trust Company of the city of New York. In August, 1893, Corra N. Williams, a stockholder and bondholder of the street railway company, brought an action in the United States Circuit Court on behalf of himself and all other creditors of said company, alleging its insolvency, and asked, among other things, that a receiver of the property of the railway company be appointed. Subsequently John Muir was, in that action, appointed receiver of all the property of the company, and duly qualified as such. In the following December, while the property was in the possession of such receiver, the Central Trust Company brought an action in the same court to foreclose the mortgage upon the property and franchises of said railway company. In that action George W. Jones was appointed receiver of its property on June 19, 1894, by an order which also provided that Muir, the receiver in the Williams suit, should turn over the property to Jones, and it directed him "to manage and operate the said railway and property, and to exercise the franchises of the said company, and to discharge the public duties, and to preserve and protect

the said property in proper condition and repair so that it may be safely and advantageously used, and to protect the title and possession, and to secure and protect the business of the same." On or about October 2, 1894, D. Cady Smith and nineteen others, owners of property on Washington avenue, presented a petition to the common council of the city of Schenectady, asking the consent of that body to the abandonment of the street railway on a portion of Washington avenue. A similar petition was presented on behalf of Jones, as receiver of the railway company in the foreclosure suit. The common council thereupon adopted a resolution authorizing Jones, as such receiver, to dispense permanently with the operation of its road between Church street and the Mohawk bridge. After the adoption of such resolution, and with the consent of twenty abutting owners, Jones took up the rails on a portion of Washington avenue, and restored the pavement. There seems to be no evidence in the case that he obtained authority to abandon the road from the court which appointed him, from the railroad commissioners, or from the State. Nor does the proof disclose that he obtained the consent of the Schenectady Street Railway Company, or its stockholders or bondholders, or of the trustee under the mortgage. On September 1, 1894, a decree of foreclosure and sale was entered, and pursuant to that decree the property mentioned therein, which included the Washington avenue railway and franchise, was sold to one Kobbe and two others. This sale was confirmed by a decree of the court February 8, 1895, and a deed thereof was executed and delivered to them by the special master appointed to make such sale on or about February 9, 1895. Kobbe and the other purchasers also received deeds of such property, rights, and franchises from the Schenectady Street Railway Company and from George W. Jones. On February 14, 1895, Kobbe and the other purchasers conveyed the mortgaged property to the present defendant, which was incorporated on that day. The complaint in the foreclosure action, the decree of foreclosure and sale, and each of the foregoing deeds specifically described the franchise to maintain a railroad on Washington avenue. In 1901 the present defendant, claiming that the alleged abandonment of the railway by the receiver was ineffective, and also claiming a right under original proceedings instituted by it, independent of any right acquired from the Schenectady Street Railway Company, attempted to relay the tracks on Washington avenue, whereupon the present actions were brought. In each of the conveyances for the six lots owned by the plaintiffs the description of the lots bounded them upon the street. The defendant's railway is "in part on the half of the street toward the plaintiffs in all cases." On the trial it was stipulated that the plaintiffs had been in possession under their respective conveyances of the premises abutting on Washington avenue for twenty-nine years. Upon the evidence and stipulation it is claimed by each of the plaintiffs that he or she owns the portion of Washington avenue in front of his or her premises to the center of the street. The defendant, however, sought to show that Washington avenue was in existence prior to August 27, 1664, and hence that it was originally a Dutch street, to which the Dutch law was applicable.

Marcus T. Hun and James A. Van Voast, for appellant.

Douglas Campbell, for respondents.

Opinion by *MARTIN, J.*

Although our decision in the case of *Peck v. Schenectady Ry. Co.*, 170 N. Y. 298, 63 N. E. 357, where we held that the use of a city street for the purposes of a street surface railroad operated by electric power imposes an added burden upon the property rights of the owners of the fee of the street, is in conflict with the rule adopted in most other jurisdictions, yet, as that case was most carefully and thoroughly examined and considered, and the conclusion reached that we should adhere to the former decision of this court upon the subject, that decision must now be regarded as final and conclusive — not to be overruled or avoided, even by indirection. Hence it follows that the owners of the fee in Washington avenue are entitled to defend against any improper invasion of or interference with their rights therein, unless they have been surrendered or impaired by some effective act of the plaintiffs or their grantors.

The defendant seeks to attack or impeach the validity of the title of the plaintiffs to the fee of the street on the ground that their premises extend only to the line of the street, and not to the center thereof. The claims upon which this contention rests are twofold: First, that Washington avenue existed anterior to 1664, and was consequently a Dutch street, to which the Dutch law applied, and placed the title of the street in the public, and not in the abutting owner; and, second, upon the authority of the case of *Graham v. Stern*, 168 N. Y. 517, 61 N. E. 891, 85 Am. St. Rep. 694, in which this court held that, where there was a conveyance of property in the city of New York bounded upon one of its streets, the presumption that the conveyance carried the fee to the center is offset, where the conveyance is by the municipal authorities, by the presumption that the municipality would not part with the ownership and control of a public street once vested in it to be forever held for the benefit of the public.

The first of these grounds is disposed of by the finding of the trial court, which, upon evidence sufficient to justify it, has found that Washington avenue was not in existence as a public highway

prior to August 27, 1664, the date of the capitulation by the Dutch to the English. Consequently, under that finding, and with our view of the case, it becomes unnecessary to consider much of the historical evidence in these cases, which was so thoroughly and exhaustively discussed upon the argument and in the briefs of counsel, as, when, in 1664, the English took possession under the charter to the Duke of York, the common law of England followed. *Mayor, etc., of New York v. Hart*, 95 N. Y. 443, 450; *Canal Appraisers v. People*, 17 Wend. 571, 583.

The contention of the defendant upon the second ground is that the title to the property claimed by the plaintiffs passed from the colony of New York, or from the local authorities of Schenectady, to the predecessors in title of the present owners, after Washington avenue had been opened, and while it was used as a public highway, and hence that, under the principle of the Graham case, the presumption is that the public authorities, in making the several conveyances under which the plaintiffs claim, intended to retain the fee of the street, and that it should not pass to the grantees under such conveyances. Thus the question at once arises whether the principle of the decision in the Graham case has any application to the facts and conditions existing in the cases at bar. Obviously, when Washington avenue became a public highway, the colony of New York was governed by the English law, under which the sovereign did not own the fee to the streets or highways, but only an easement upon the land over which they extended. Under the common law of England, the title to the land in a street or highway was not in the King, but in the lord of the manor, subject only to the easement of the public to a way over it. *Goodtitle v. Alker*, 1 Burr. 133, 135. In this State, as between a grantor and grantee, the conveyance of a lot bounded upon a street carries the land to the center, and there is no distinction in this respect between the streets of a city and country highways. The rights of the public in a street or highway are no higher or other than those of a mere easement, and the proprietors on each side presumptively own the soil in fee to the center thereof. *Bissell v. New York Cent. R. Co.*, 23 N. Y. 61; *Wager v. Troy Union R. Co.*, 25 N. Y. 526, 529; *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65, 71; *Potter v. Boyce*, 73 App. Div. 383, 77 N. Y. Supp. 24; *Wallace v. Fee*, 50 N. Y. 694; *Holloway v. Southmayd*,

139 N. Y. 390, 400, 34 N. E. 1047, 1052. The same rule applies where the conveyance is from the State or Commonwealth, and the land is described as abutting upon a street, without any reservation or declaration of intention not to convey to the center. Such a conveyance, like a conveyance between individuals, is presumed to carry the title to the center of the street, subject to the public right of way over it. This was expressly held in *Cheney v. Syracuse, O. & N. Y. R. Co.*, in which the opinion at Special Term was written by Judge Vann. That case was affirmed by the Appellate Division (8 App. Div. 620, 40 N. Y. Supp. 1103) upon the opinion of the Special Term, and also affirmed by this court (158 N. Y. 739, 53 N. E. 1123). *Gere v. McChesney*, 84 App. Div. 39, 82 N. Y. Supp. 191; *Syracuse Solar Salt Co. v. Rome, W. & O. R. Co.*, 43 App. Div. 203, 60 N. Y. Supp. 40, affirmed in 168 N. Y. 650, 61 N. E. 1135; *Ex parte Jennings*, 6 Cow. 518, 16 Am. Dec. 447; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 38 Am. Rep. 407; *Smith v. City of Rochester*, 92 N. Y. 463, 44 Am. Rep. 393.

The doctrine of these authorities renders it obvious that the plaintiffs and their grantors, under their deeds describing the property as bounded by the street or way, presumptively took title in fee to the center of the street, and must be regarded as the owners thereof. Therefore, under the principle of the Peck case, they are entitled to restrain the defendant from operating its road over their premises, unless they consented thereto. The cases at bar are clearly distinguishable from the Graham case, as in that case the city of New York was the owner in fee and in possession of the streets, and held the title thereto in trust for street purposes.

This brings us to the question of consent, which relates only to the cases of the plaintiffs Paige, Whitmyre, and Thompson, and involves the effect of their consents, or the consent of their predecessors in title, to the construction of the Schenectady street railway. That they originally consented to the construction of that road is abundantly proved, and not denied. But the contention of the plaintiffs named is that the railway was subsequently abandoned, and, therefore, their consents were nullified, and have no present effect or operation. The findings of the court upon this question are somewhat conflicting. By its first decision, which is in the short form, it stated as a ground therefor that the defend-

ant was operating its railway upon Washington avenue in front of the premises of the plaintiffs without their consent. In its specific finding it found that the Schenectady Street Railway Company obtained the consent of the plaintiffs Paige, Whitmyre, and Charles Thompson, the predecessor in title of the plaintiff Thompson, and that they also consented to the change of motive power from horse power to electricity. In considering this question, the findings most favorable to the defendant must be accepted as true. *Parsons v. Parker*, 159 N. Y. 16, 53 N. E. 710; *Israel v. Manhattan Ry. Co.*, 158 N. Y. 624, 53 N. E. 517.

The consents in this case were in writing, under seal, acknowledged by the parties, and were valid grants of the right to build and operate such railway over the street, including the premises of the above-named plaintiffs. Having been once given, and the railway having been constructed, they cannot be withdrawn, and are a bar to these actions, so far as the plaintiffs signing such consents are concerned, unless the rights under them which were acquired by the Schenectady Street Railway Company and transferred to the defendant have become invalid. *Adee v. Nassau Electric R. Co.*, 65 App. Div. 529, 72 N. Y. Supp. 992, affirmed in 173 N. Y. 580, 65 N. E. 1113; *Geneva & W. Ry. Co. v. N. Y. C. & H. R. R. Co.*, 163 N. Y. 228, 57 N. E. 498; *Heimburg v. Manhattan Ry. Co.*, 162 N. Y. 352, 56 N. E. 899.

The claims of these plaintiffs are that the rights acquired under their consents were abandoned by the act of Jones as receiver, in the mortgage foreclosure suit, and by the action of the common council of the city of Schenectady in consenting to the abandonment of the railway upon a portion of Washington avenue, including that in front of their premises. Jones was appointed receiver to manage and operate the railway and property belonging to the Schenectady Street Railway Company, to preserve and protect it in proper condition and repair, and to protect the title and possession thereof, and the business of the same. Under this limited authority, we can discover no principle upon which the receiver had a right to abandon any of the property belonging to such railway company without the consent of the company, of its stockholders, and the consent of the Legislature of the State. Nor was the common council clothed with any authority to compel or to authorize an abandonment of any portion of such street rail-

way. While its consent might possibly waive any right the city possessed to enforce, or compel the enforcement of, a continued operation of the road, still it certainly could not, by any action upon its part, deprive the railway company of its rights, or affect the rights of the stockholders or the rights of the State and general public to require the company to continue the maintenance and operation of its road as originally constructed. These consents vested in the original railway company the right to maintain its road on Washington avenue in front of the plaintiff's premises, and, having been once given, and the road constructed, they could not be withdrawn at the will of the owner, where, as in this case, there was no contract with the company to that effect, no consent by the State or general public, or by the stockholders of the company, and no consideration therefor. *Adee v. Nassau Electric R. Co.*, 65 App. Div. 529, 72 N. Y. Supp. 992, affirmed in 173 N. Y. 580, 65 N. E. 1113; *White v. Manhattan Ry. Co.*, 139 N. Y. 19, 34 N. E. 887; *Heimburg v. Manhattan Ry. Co.*, 162 N. Y. 352, 356, 56 N. E. 899; *Bellew v. N. Y., W. & C. Traction Co.*, 47 App. Div. 447, 62 N. Y. Supp. 242.

The right to maintain this railway upon Washington avenue in front of these plaintiffs' premises passed under the sale in the action of foreclosure, and ultimately vested in the defendant. Under the original consents, the railway company obtained a property right to construct and operate its road, which could not be destroyed by the action of the receiver or of the common council, or by the consent of a portion of the owners of the land abutting on the street, or by all. Moreover, in this case the receiver had no authority from the court to thus abandon a portion of the road. He was required to operate and conduct the business of the road in accordance with the laws of the State, which gave him no authority to abandon any portion of the mortgaged property. *Erb v. Morasch*, 177 U. S. 584, 20 Sup. Ct. 819, 44 L. Ed. 897. His functions were confined to the care and preservation of the property, and his appointment gave him temporary management of the railroad under the direction of the court, and nothing more. He did not represent the corporation, or supersede it in the exercise of its powers, except in relation to the possession and management of the property committed to his charge. Notwithstanding his

appointment, the corporation was clothed with its franchise, which still existed. Such an appointment vested in the court no absolute control over the property. The possession taken by the receiver was only that of the court, and added nothing to the previously existing title of the mortgagees. *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379; *Fosdick v. Schall*, 99 U. S. 235, 251, 25 L. Ed. 339. Nor did the removal of the tracks by the receiver determine or forfeit the franchise of the original company over Washington avenue, so as to prevent the defendant, who had succeeded to its rights, from relaying its tracks thereon. Such abandonment only operated as a cause of forfeiture, of which the public alone could take advantage. *Trelford v. Coney Island & Brooklyn R. Co.*, 6 App. Div. 204, 40 N. Y. Supp. 1150; *Thompson v. N. Y. & H. R. Co.*, 3 Sandf. Ch. 625. A railroad corporation owes a duty to the public to exercise the franchise granted to it, and it cannot abandon a portion of its road and incur a forfeiture at its mere pleasure. A charter must be accepted or rejected *in toto*. If accepted, it must be taken as offered, and the company has no right to accept in part and reject in part. *People v. Albany & Vermont R. Co.*, 24 N. Y. 261, 269, 82 Am. Dec. 295; *Matter of Metropolitan Transit Co.*, 111 N. Y. 588, 19 N. E. 645; *Collins v. Amsterdam St. R. Co.*, 76 App. Div. 249, 78 N. Y. Supp. 470; *Goelet v. Metropolitan Transit Co.*, 48 Hun, 520, 1 N. Y. Supp. 74.

The right to construct and operate a street railway is a franchise which must have its source in the sovereign power, and the legislative power over the subject has this limitation: that the franchise must be granted for public, and not for private, purposes, or, at least, the grant must be based upon public considerations. It is well settled, on the soundest principles of public policy, that a contract by which a railroad company seeks to render itself incapable of performing its duties to the public, or attempts to absolve itself from its obligations without the consent of the State, is void, and cannot be rendered enforceable by the doctrine of estoppel; and any contract which disables the corporation from performing its functions without the consent of the State, and to relieve the grantees of the burden it imposes, is in violation of the contract with the State, and is void as against public policy. *Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 307; *Union Pacific*

R. Co. v. Chicago, etc., Ry. Co., 163 U. S. 564, 581, 16 Sup. Ct. 1173, 41 L. Ed. 265; *State v. Hartford & New Haven R. Co.*, 29 Conn. 538; *State v. S. C. & P. R. Co.*, 7 Nebr. 357; *City of Potwin Place v. Topeka Ry. Co.* (Kan.), 36 Pac. 309, 37 Am. St. Rep. 312; *State v. Spokane St. R. Co.* (Wash.), 53 Pac. 719, 41 L. R. A. 515, 67 Am. St. Rep. 739; *Rex v. Severn & Wye R. Co.*, 2 B. & Ald. 646.

Within the principle of the cases cited, it is obvious that the public had an interest in that portion of the Schenectady street railway which was constructed in Washington avenue, which could not be destroyed or abandoned without the consent of the State, and that the consents given by the plaintiffs survived the attempted abandonment of the railway upon Washington avenue. That such was the policy of the State is manifest, and, independent of the statute, neither the corporation, the common council, nor the receiver possessed any right to abandon the property or any part thereof. Nor could they destroy the effect of the consents of the plaintiffs through which the company acquired the right to construct its railway over the street. That such was the law anterior to the statute we have no doubt, and the statute, which is little, if any, more than a codification of the law as it previously existed, expressly provides that in case of the dissolution of the charter of a street surface railroad corporation, or upon its repeal, the consents of the owners and of the local authorities having control of the highway upon which the railroad shall have been constructed shall not be deemed to be in any way impaired, revoked, or terminated by such dissolution or repeal, but shall continue in full force, efficacy, and being. Railroad Law, § 105 (Heydecker's Gen. Laws, p. 3320, chap. 39). The defendant was a reorganized corporation which, by virtue of such foreclosure and sale, acquired all the rights and franchises of the original company, and is bound to exercise the franchises of its predecessor. Stock Corp. Law, § 3 (Laws 1892, p. 1825, chap. 688).

These plaintiffs also seek to have their consents held ineffective upon the ground that the defendant subsequently attempted to obtain the consent of the property-owners to a reconstruction of its road on Washington avenue, and, having failed, has secured the approval of that route by the Appellate Division. The fact that the defendant, from abundant caution, acquired the approval of

the court to run its road over that portion of Washington avenue, in no way forfeited or impaired its rights acquired under the original consents of these plaintiffs. That proceeding was, perhaps, unnecessary, but it was at most by way of further assurance, and not destructive of the rights already acquired. These consents being in the nature of conveyances of easements in the street, the right thereby acquired was not destroyed by reason of the proceeding which was taken to obtain the approval of the Appellate Division. *Adee v. Nassau Electric R. Co.*, 65 App. Div. 529, 72 N. Y. Supp. 992, affirmed, 173 N. Y. 580, 65 N. E. 1113. Without further discussion of this question, we are of the opinion that the consents of the three plaintiffs mentioned gave the Schenectady Street Railway Company the right to build and operate its railroad over Washington avenue in front of their premises; that no action of the receiver, the common council, or abutting owners has in any way invalidated or affected such consents, and that the same are in full operation and effect, and constitute a bar to their recovery in this action. Therefore, the judgments in their favor should be reversed.

We are now brought to the consideration of a question which need be discussed only in its application to the Van Epps case. Under this decision, by which we have held that the property of all the plaintiffs originally extended to the center of Washington avenue, and in view of our decision in the Peck case, 170 N. Y. 298, 63 N. E. 357, it follows that, as to a part of the Van Epps lot at least, he originally owned the fee to the center of the street, and the defendant had no right to relay its tracks over his premises. It is, however, claimed that, inasmuch as the street was subsequently widened and a strip of land outside of the original street was taken, he cannot recover for that portion lying between the center of the street and the line of the lands thus taken. Without specially discussing the grounds upon which this claim is made, and thus unduly prolonging this already too lengthy opinion, we think it must be held that the fee to some portion of the land owned by Van Epps, and lying between the center of Washington avenue and the former boundary thereof, still rests in him, and that he is entitled to restrain the defendant from building its road across that piece of land, although its value can be little more than

nominal. So far as this question applies to the land of the plaintiff Whitmyre, it need not be considered, as we have a verdict for that, by virtue of the consent he executed, he has no right to maintain the action.

We have examined the various exceptions to the admission and rejection of evidence, but have found none that would require reversal, or that require special consideration. It follows as to the actions in which Paige, Whitmyre, and Thompson are plaintiffs, the judgments should be reversed and the actions dismissed, and that, as to the actions in which Lansing, and Beattie are plaintiffs, the judgments should be affirmed.

Judgments in the Paige, Whitmyre, and Thompson cases reversed, and the complaints dismissed, with costs. As to the actions in which Lansing, Van Epps, and Beattie are plaintiffs, judgments are affirmed, with costs.

PARKER, C. J., and O'BRIEN, HAIGHT, VANN, CHASE, and WERNER, JJ., concur.

Judgments accordingly.

Cases in the Appellate Division of the Supreme Court of New York not Reported in Full.

1. COLLISION WITH VEHICLE AT STREET INTERSECTION; WHAT STREET INTERSECTION; COMPANY'S NEGLIGENCE QUESTION
In the case of *Freeman v. Brooklyn Heights R. Co.*, 87 A. 2d 84 N. Y. Supp. 108, it appeared that the plaintiff was being carried in a wagon upon the east-bound track of the defendant's railroad. The wagon turned to cross diagonally for the purpose of taking a crossing at an intersection with the street on which the tracks were laid. As the wagon turned upon its new course one of the defendant's cars approached from the east on the northerly track at an unusual rate of speed. The rear wheel of the wagon. The plaintiff hearing the approach of the car jumped from the wagon for the purpose of avoiding the collision, but the collision threw the wagon upon him and he was injured. At the place where the accident occurred a street entered the avenue which the tracks were laid, but was not continued directly into the avenue, but its course ran into a street on the other side of the avenue a few feet to the west. It was held that though the two streets entering the avenue were not directly opposite, they formed a continuous line of traffic. The rule which holds that the railroad companies and other users of streets have equal rights at

sections would apply. It appearing that the defendant's employees made no effort to stop the car until it had traversed one-half the distance between the two crosswalks at the street intersection, the question of the defendant's negligence should have been submitted to the jury for its determination. The fact that the plaintiff had not attempted to cross the street at the street intersection but was at all times upon the street in which the tracks were laid does not affect the application of the rule as to the rights of travelers at street intersections.

A judgment for the defendant and an order denying the plaintiff's motion for a new trial were reversed.

2. COLLISION WITH VEHICLE AT STREET INTERSECTION;¹ CONTRIBUTORY NEGLIGENCE IN FAILING TO STOP WHERE A CAR WAS SEEN APPROACHING.—In the case of *Goldkranz v. Metropolitan Street Ry. Co.*, 89 App. Div. 590, 85 N. Y. Supp. 667, the plaintiff testified that before crossing the defendant's tracks at a street intersection he stopped and looked up and down; that he then saw a car about half a block away, going at a speed of about five miles an hour; that he thought he could pass without being struck, but that the car came at full speed and struck his hind wheel, throwing him from the wagon and injuring him. Upon cross-examination he testified that he did not know how far he was from the track when he first saw the car, but that after he got into the street where the tracks were, and passed the line of the elevated railroad stairs, he saw the car. The wagon was driven toward the track at a rate of six or seven miles an hour. The court held that there was no evidence to justify a finding that the plaintiff was free from contributory negligence. The court said: "He drove down the street at a fast rate right in front of the approaching car. He saw the car coming, and made no effort to stop or avoid the car. He says he thought he could get over in time, but in this he was mistaken, and it was this mistake that caused the accident. Nor does the evidence sustain the finding that the defendant was negligent. There is no evidence to show that, when the plaintiff drove upon the track in front of the approaching car, the motorman could have stopped the car to avoid the accident, or that the car was then at such a distance from the wagon that it was possible to stop it. It, therefore, appears that the plaintiff was grossly negligent in driving in front of this rapidly approaching car, when, according to his own story, he could have stopped his wagon and allowed the car to pass. The car was brilliantly lighted; the plaintiff was carrying no lamp or light of any kind; it was 2 o'clock in the morning; and in the absence of evidence to show that the car was in such a condition that the motorman could have stopped it after the plaintiff drove upon the track, or was in a position of danger, and thus avoid the collision, there was no ground for a charge of negligence against the defendant."

A judgment for the plaintiff, and an order denying the defendant's motion for a new trial were reversed.

1. See note to *Roefeldt v. St. Louis & Sub. Ry. Co.*, *ante*, p. 562.

- 3. COLLISION WITH VEHICLE AT STREET CROSSING; INSTRUCTION AS TO RIGHT OF DRIVER TO CROSS AHEAD OF CAR.**—In the case of *Binsell v. Interurban Street Ry. Co.*, 91 App. Div. 402, 86 N. Y. Supp. 913, the plaintiff sought to recover damages resulting from a collision between a wagon driven by him and one of the defendant's street cars at a street crossing. The court charged the jury that "now of course, if the horse was walking, and this car was fifty feet away, he would have a perfect right, that car going at a reasonable rate of speed, and he within ten or fifteen feet of a rail at a crossing, a regular crossing,—he would have a perfect right to undertake to cross the track if the car was fifty feet from him." This charge was held erroneous since it was equivalent to the direction of a verdict in favor of the plaintiff in the event that they reached the conclusion that at the time the plaintiff undertook to cross the defendant's tracks, the relative distances of the vehicles from the point of collision were as stated by the court. It removed from the consideration of the jury both the question of the defendant's negligence and that of the plaintiff, and instructed them that the controversy should be determined upon the theory that as matter of law the plaintiff when walking his horse at a distance of ten or fifteen feet from the track had a right to undertake to cross which was "perfect," notwithstanding an approaching car was only fifty feet away. Such a charge eliminated the possibility of the plaintiff's contributory negligence.

A judgment for the plaintiff and an order granting the defendant's motion for a new trial were reversed.

- 4. COLLISION WITH HOOK AND LADDER TRUCK; STATUTE GIVING RIGHT OF WAY TO FIRE APPARATUS;² CARE REQUIRED OF MOTORMAN; DUTY OF DRIVER OF TRUCK; INSTRUCTIONS.**—In the case of *The City of New York v. Metropolitan St. Ry. Co.*, 90 App. Div. 66, 85 N. Y. Supp. 693, the plaintiff sought to recover damages for injuries to a hook and ladder truck owned by it, which was struck while being driven across the track of the defendant by one of the defendant's cars. The Greater New York Charter, § 748, as amended by Laws 1900, chap. 155, gives fire apparatus when on duty, proceeding to a fire, the right of way in a public street over all other vehicles except those carrying the United States mail. Under this statute the driver of a fire truck, going to a fire, had the right to assume on crossing a street railroad track that the motorman of an approaching street car, on discovering the truck, would so control his car as to give the truck the right of way.

In such a case it is proper to refuse to instruct the jury that "all that was required of the motorman at the time that he apprehended danger was to use ordinary care to bring his car to a stop," as such

². See *Geary v. Metropolitan St. Ry. Co.*, 1 St. Ry. Rep. 581 (and note), 84 App. Div. 514, 82 N. Y. Supp. 1016; *Knox v. No. Jersey St. Ry. Co.*, *ante*, p. 732.

instruction might have misled the jury into believing that the defendant would not be responsible if the motorman used ordinary care to stop the car at the time he apprehended danger, even though the danger was caused by his previous negligence. It was also held proper to refuse an instruction to the effect that if at the time the motorman saw the danger he applied the reverse, acting in the belief that that was the best method of stopping the car, the defendant could not be found guilty of negligence because the motorman did not apply the brakes. It was held proper to charge the jury that the driver of the truck was bound to respond to the alarm of fire with the greatest practicable speed, and was only bound to drive with that care which a prudent person would exercise under like circumstances. Citing *Farley v. The Mayor*, 152 N. Y. 222, 46 N. E. 506, 57 Am. St. Rep. 511.

A judgment for the plaintiff, and an order denying the defendant's motion for a new trial were affirmed.

5. COLLISION WITH VEHICLE TURNING FROM ONE TRACK TO ANOTHER TO ESCAPE A CAR APPROACHING FROM THE REAR; QUESTION OF NEGLIGENCE FOR THE JURY.—In the case of *Pritchard v. Brooklyn Heights R. Co.*, 89 App. Div. 269, 85 N. Y. Supp. 898, it appeared that the plaintiff's injuries resulted from a collision between his horse and wagon and one of the defendant's street cars. The plaintiff testified that while he was driving south along the street in which the defendant's tracks were laid, on the right-hand track, the motorman of a car approaching him from the rear sounded his bell warning him of the approach of the car; that being prevented from passing to the right track by a wagon standing in the street, he turned his horse toward the defendant's left-hand track; that as he did so he discovered one of the defendant's cars approaching him on the left-hand track at a fair rate of speed; that he tried to turn his horse back out of the way of the approaching car, but that the horse was struck by the car; that he saw the car in question when it was half a block away, and that the collision occurred at about the center of a street intersection. It was held that under these facts it could not be said as a matter of law that the defendant was free from negligence, or that the plaintiff was guilty of contributory negligence. The court said: "If the plaintiff could see the defendant's car half a block away, no reason is suggested why the defendant's motorman might not have seen the plaintiff's horse and wagon an equal distance, as well as have discovered his predicament. It was clearly the duty of the plaintiff, on the approach of the car from the rear, to get out of the way if he could; he was being urged by the clanging of the bell to make room for the car, and the obstructed highway at the right-hand side made it impossible for him to turn in that direction. If, under the circumstances, he turned in the opposite direction, with the car of the defendant half a block away and approaching a point where three streets intersect, it can hardly be said as a matter of law that he failed to use the degree of care which a reasonably prudent man under the same circumstances would or should

have used. The plaintiff, upon his theory of the case, was in a pocket; he was being urged from the rear, and the fact that he may not have used the highest degree of prudence under such circumstances is not strange. He appears to have used his best endeavors to get out of the way of the car in the rear, and in doing so got into the path of the approaching car, the motorman of which, so far as appears, was in a position, if he used his eyes, to see and appreciate the plaintiff's position. If this was true, the duty devolved upon the defendant to stop its car and give the plaintiff an opportunity to get out of his position. While it may be that the defendant had a paramount right to the tracks, as related to the plaintiff, a paramount right is not a license to run cars in disregard of the rights of those who are lawfully using the highways, and who are making an effort to discharge their duty by getting out of the way of approaching cars. It is probably true that the plaintiff had a right, under the circumstances described, to keep on the tracks of the defendant in front of the car until he had reached a point where he could turn out in safety, but the mere fact that he did not do so, but undertook, under the urgent demand of the defendant's motorman in the rear, to clear the track, is not, as a matter of law, negligence on his part. There were different inferences which might be legitimately drawn from the conceded facts, and these were for the jury rather than the court to decide."

A judgment for the defendant was reversed.

6. COLLISION WITH VEHICLE BEING DRIVEN ALONG TRACK; CONTRIBUTORY NEGLIGENCE PRECLUDING RECOVERY.—In the case of *Geleta v. Buffalo & Niagara Falls Elec. Ry. Co.*, 88 App. Div. 372, 84 N. Y. Supp. 629, it appeared that while the plaintiff was driving along a highway with the wheels on one side of his wagon between the rails of the defendant's track, a car approaching from the rear at a speed of twenty or thirty miles an hour collided with the wagon and threw the plaintiff to the ground, causing the injuries complained of. The accident occurred about 7 o'clock in the evening. It was dark, and the plaintiff had no light upon his wagon to indicate to the motorman of the approaching car that the team and wagon were upon the track. He could have safely driven on either side of the track, where a passing car would not have struck him. The car had a headlight and was lighted inside with electricity, and could have been seen by the plaintiff if he had looked behind for three or four thousand feet before it reached him. The car was in full view of the plaintiff for two minutes before it struck the wagon, and yet during that time he did not look around to see whether a car was coming until it was too late to get off the track and avoid the accident. It was held that there was not only a failure to show the absence of contributory negligence, but the evidence showed affirmatively that the plaintiff was guilty of negligence contributing to the accident.

A judgment for the plaintiff and an order denying the defendant's motion for a new trial were reversed.

7. COLLISION WITH VEHICLE; EVIDENCE AS TO SIMILAR ACCIDENTS; INSTRUCTION AS TO DEGREE OF CARE BY DEFENDANT.—In the case of *Peiras v. United Traction Co.*, 88 App. Div. 260, 84 N. Y. Supp. 992, the plaintiff sought to recover damages for the death of her husband which occurred in a collision between a wagon in which he was riding and one of the defendant's street cars. The plaintiff's evidence tended to show that by reason of the excessive speed and mismanagement of the car, and the unevenness of the defendant's track, the car was derailed and struck the wagon, which was some distance from the track. The defendant's evidence was to the effect that the horse attached to the wagon suddenly swerved or was driven upon the track in front of the car. The motorman in the employ of the defendant testified that the track at the point in question was not uneven, and that the quick stopping of the car had no tendency to derail it. It was held error to permit this witness to testify on cross-examination as to how many times, at other places on the defendant's road, and under circumstances not shown to be similar to those existing at the time and place of the accident, his car had been derailed; evidence of such a character is only permissible where similar accidents have happened in the same locality and under the same conditions.³

An instruction to the effect that it was the duty of the defendant at all times to so run their cars, notwithstanding their paramount right of way, that the safety of other travelers upon the common highway shall be protected, was held erroneous, since the defendant was only bound to exercise reasonable care in the use of its superior right of way over its tracks.

A judgment for the plaintiff and an order denying the defendant's motion for a new trial were reversed.

8. COLLISION WITH VEHICLE DRIVEN ON A NARROW BRIDGE; INSTRUCTION AS TO DEGREE OF CARE REQUIRED OF DEFENDANT.—In the case of *Lockwood v. Troy City Ry. Co.*, 92 App. Div. 112, 87 N. Y. Supp. 311, the plaintiff sought to recover damages for injuries sustained by him in consequence of a collision between his wagon and one of the defendant's cars. It appeared that the collision occurred upon a bridge which was so narrow that there was only a small margin of space outside the defendant's tracks in which the plaintiff's wagon could pass the defendant's car. The court charged the jury to the effect that the narrowness of the passageway of the bridge placed the duty upon the motorman to exercise greater care and caution than he would if the passageway had been wider. The court was requested to charge that while the duty and obligation must be proportioned to the surrounding circumstances, the defendant's motorman was not bound to exercise an extraordinary degree of care in the operation of the car. The court declined to so charge. It was held that the denial of the request to charge as to the duty of the motorman to use an extraordinary degree of care was erroneous. The defendant

3. See *Stevens v. Boston Elev. Ry. Co.*, *ante*, p. 435, and note.

was entitled to an instruction that the motorman was only bound to use ordinary care under the circumstances which confronted him.

A judgment for the plaintiff, and an order denying the defendant's motion for a new trial were reversed.

9. **INJURY TO A HORSE DRIVEN UPON BRIDGE; DUTY OF MOTORMAN TO STOP CAR WHEN HORSE IS FRIGHTENED.**⁴—In the case of *Adsit v. Catskill Elec. Ry. Co.*, 88 App. Div. 167, 84 N. Y. Supp. 393, it appeared that a horse was driven upon a bridge over which the defendant's tracks were laid, as one of the defendant's cars came upon the bridge from the opposite direction. The bridge was narrow so that when a car was on the track only about eight and one-half feet of space was left for the use of vehicles. The plaintiff's horse was walking and the trolley car was traveling at a rate of from four to twelve miles an hour. The horse commenced to show evidence of fright when the car was about 300 feet distant. The driver motioned to the motorman to slow down his car, but the speed of the car was not slackened. When the car was at a distance of from twenty to forty feet the horse swerved across the track and was struck by the car and injured, so that he had to be killed. The car did not stop until it had passed five or more feet beyond the horse. One of the plaintiff's witnesses testified that a car traveling at the rate of eight miles an hour could be stopped within a distance of fourteen feet. It was held that the evidence was sufficient to justify a verdict in favor of the plaintiff. The court declared the rule to be that the measure of care to be exercised toward persons rightfully in a street or upon a bridge by corporations running trolley cars thereon is such reasonable care as an ordinarily prudent person would exercise under all the circumstances.

A judgment for the plaintiff and an order denying the defendant's motion for a new trial were affirmed.

10. **COLLISION WITH BICYCLIST AT STREET CROSSING; INABILITY OF MOTORMAN TO PREVENT COLLISION.**—In the case of *Schroeder v. Metropolitan St. Ry. Co.*, 87 App. Div. 624, 84 N. Y. Supp. 371, it appeared that the plaintiff who was riding a bicycle attempted to cross the tracks of the defendant immediately in front of a car, and was struck by the car and injured. The preponderance of testimony was to the effect that she crossed in such close proximity to the car which struck her that the motorman could not stop his car before causing the injury. She herself testified that she saw the car approaching, but thought she had plenty of time to cross. The court held that she was precluded by contributory negligence from recovering for the injuries sustained.

A judgment for the plaintiff and an order denying the defendant's motion for a new trial were reversed.

11. **COLLISION WITH PEDESTRIAN AT STREET CROSSING; WALKING IN FRONT OF APPROACHING CAR; FAILURE OF MOTORMAN TO GIVE WARNING OR STOP CAR.**—In the case of *Lynch v. Third Avenue R. Co.*, 88 App. Div. 604,

4. As to horse frightened by street car and duty of motorman to stop, see note to *Lincoln Trac. Co. v. Moore*, ante, p. 642.

85 N. Y. Supp. 180, the plaintiff in attempting to cross the tracks of the defendant at a street crossing in the daytime was struck by a car and injured. It appeared that when the plaintiff left the street corner he saw the car which subsequently struck him approaching, and that it was then about a block and a half or two blocks away. It was plainly visible and there was nothing to show that he exercised any care whatever after he left the corner to cross the tracks, or that he looked to see where the car was, but instead walked heedlessly and carelessly upon the tracks and was injured. Upon such facts the plaintiff failed to meet the burden which rested upon him to show that he was free from contributory negligence in not seeing the car before he stepped in front of it. Whether or not the gong was sounded or notice given of the approach of the car was of no importance because the plaintiff saw the car and knew it was approaching. Nor had the plaintiff any right to assume under the circumstances that the car would be so controlled that he could cross the street in safety.

A judgment for the plaintiff and an order denying the defendant's motion for a new trial were reversed.

12. COLLISION WITH PEDESTRIAN AT CROSSING; QUESTION OF CONTRIBUTORY NEGLIGENCE FOR JURY.—In the case of *Beers v. Metropolitan St. Ry. Co.*, 88 App. Div. 9, 84 N. Y. Supp. 785, the plaintiff, a passenger on one of the defendant's street cars, on alighting therefrom at a crossing passed behind the car to cross the other track, and was struck by a car traveling at the rate of fifteen miles an hour. There was evidence to the effect that when the plaintiff started from the point at which she alighted the car which struck her was from 60 to 100 feet distant. Before going upon the track she looked both ways and saw no car approaching, although it was admitted that there was nothing at the time to obstruct the plaintiff's view of the approaching car. It was held that the evidence was sufficient to warrant a submission to the jury of the question of the plaintiff's contributory negligence.

In charging the jury the court commented upon the evidence by stating that he believed the witnesses for one side or the other had perjured themselves, and that there was presented to the jury such a mass of conflicting evidence that it was improbable that the truth could be found, and that if it could not, the defendant must have the verdict; the court further said that believing there had been perjury, he was of the opinion that it had been committed by the plaintiff's witnesses, and that if he was sitting in the jury-box, he would lend his influence to find a verdict for the defendant; and further the court stated that under the circumstances it was quite impossible for the jury to find otherwise than that the plaintiff was guilty of contributory negligence, for her testimony and the story of her witnesses were so inharmonious with the laws of nature and the ordinary observations of men as to be incredible. It was held that this part of the court's charge was erroneous and required a reversal of a judgment entered upon a verdict in favor of the defendant.

A judgment for the defendant and an order denying the plaintiff's motion for a new trial were reversed.

- 13. COLLISION AT STREET CROSSING WITH PEDESTRIAN STANDING BETWEEN NORTH AND SOUTH-BOUND TRACKS.**—In the case of *Mulligan v. Third Avenue Ry. Co.*, 87 App. Div. 320, 84 N. Y. Supp. 366, the plaintiff, while attempting to cross a street over the tracks of the defendant on a cross-walk, was struck by one of the defendant's cars and injured. The plaintiff testified that she crossed the south-bound track directly after some trucks and a car had passed on that track; that as she stepped upon the westerly rail of the north-bound track she saw a north-bound car, which was then about twenty-four or twenty-five feet away approaching her very rapidly; that she turned to retrace her steps, but discovered a large truck approaching her on the south-bound track, the easterly wheels of which truck extended about fourteen inches east of the easterly rail of the south-bound track; that she tried to stand in the center of the space between the north-bound car and the south-bound truck, but that she was struck and injured by the north-bound car; that on account of the trucks and the south-bound car which passed her before she went upon the north-bound track, she did not see the north-bound track, nor did she see the truck approaching on the other track before she reached the north-bound track. There was further evidence in behalf of the plaintiff to the effect that no gong was rung upon the car that struck the plaintiff. The car was running at a speed of eight or nine miles an hour and could have been stopped within a distance of fifteen or twenty feet. The motorman admitted that he saw the plaintiff standing between the two tracks, and that he made no attempt to stop the car until after she was struck. It was held that it could not be said as a matter of law that the plaintiff was guilty of contributory negligence, or that the defendant was free from negligence. The evidence was considered and it was held that the court would not be justified in setting aside the verdict as against the weight of evidence.

A judgment for the plaintiff and an order denying the defendant's motion for a new trial were affirmed.

- 14. COLLISION WITH PEDESTRIAN AT STREET INTERSECTION; CONTRIBUTORY NEGLIGENCE.**—In the case of *Mauer v. Brooklyn Heights R. Co.*, 87 App. Div. 119, 84 N. Y. Supp. 76, it appeared that the plaintiff attempted to cross a street in which the defendant's tracks were laid. She turned upon the street from an avenue which did not cross the street. Wishing to take another street opening into such street at a distance below, she diagonally crossed the defendant's tracks. Before crossing the track she looked and saw one of the defendant's cars approaching from the rear at a distance of about a block. When between the first and second tracks of the defendant's road she looked a second time, and the car then appeared to be half a block away. After she had taken a few steps she was struck by the fore part of the car after the fender had safely passed her. The car was running at the rate of seven or eight miles an hour. It was held that in contemplation of law the two streets, although not directly opposite, constituted a street intersection, and that at such crossing the

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charge was erroneous; that under the circumstances the duty of a motorman to so operate his car as to prevent the discovery of the person's peril does not apply to this presence of a boy upon the track and the subsequent operation of the car did not present two distinct situations based upon two degrees of negligence on the part of the motorman, but constituted one situation or condition resulting in the accident.⁷

A judgment for the plaintiff and an order denying the motion for a new trial were reversed.

17. **INJURY TO CHILD CROSSING TRACK; FALL OF CHILD WHILE ATTEMPTING TO CROSS; EFFORT OF MOTORMAN TO AVOID COLLISION.**—In *Sciurba v. Metropolitan St. Ry. Co.*, 87 App. Div. 614, 84 N. Y. App. Div. 2d 614, the plaintiff's deceased, a child of the age of five years, was struck by the car of the defendant while crossing the street, in front of an approaching car, was struck by the car. A companion testified that just as the child ran on the sidewalk he was caught in the slot on the track and he fell down. There was evidence that the car was going rapidly, but nothing to show that the speed was excessive, or that the motorman did not have the car under control. Nor was there anything to show that the motorman was negligent in his business and did not stop the car as quickly as possible from the situation he would have reason to suppose that the child would run in front of the car. Although there was confusion as to the exact distance of the car from the deceased when he started to run across the street, there was evidence to show that when the deceased fell the car was within a distance of ten feet. The motorman himself testified that as soon as he saw the child start to run across the street he applied the brake, put on the sand, and used the sand-box, and succeeded in stopping the car within six feet after the deceased was struck. It was held that the evidence was insufficient to establish negligence on the part of the motorman.

A judgment in favor of the plaintiff and an order denying the motion for a new trial were reversed.

18. **DEATH OF CHILD BY COLLISION; DUTY TO PROVIDE FENCE.**—In the case of *Fritsch v. New York & Queens County Ry. Co.*, 93 N. Y. App. Div. 2d 87, 87 N. Y. Supp. 942, the plaintiff's intestate, a boy of seven years of age, was run down by one of the defendant's electric cars while crossing a street and killed. It was held that the age of the child was such that the jury were at liberty to find that he was negligent and with contributory negligence.

It appeared that the car was not provided with a fender. The plaintiff testified, without objection, that he had seen other cars in the same locality for about four years, and that they were in general use. The defendant subsequently objected to the admission of this evidence.

⁷ As to injury to child on or near tracks, see note to *Jett v. Ry. Co.*, ante, p. 513, and *Kube v. St. Louis Trans. Co.*, ante, p. 5

mission of such testimony, but the objection was overruled. It was held that such testimony was competent.

The defendant requested a charge "that absence of fenders on the cars of the defendant cannot be considered as negligence or a want of care or prudence." The court declined to so charge, "because the jury may consider the equipment of the car, in connection with the speed at which it was running, and all the other things belonging to the use of such car as part of the paraphernalia and surroundings and equipment that go to make up the particular car with which the accident happened." It was held that the jury could not have been misled by the ruling of the court upon the defendant's request to charge. Where a jury is satisfied from the evidence that the injury would have been prevented by the use of a safeguard, such as a fender, which is usually attached to cars of similar construction, operated in similar localities generally throughout the country, and which has proved ordinarily efficacious for the protection of persons upon the highway, they are entitled to predicate negligence upon the omission to provide the cars with such safeguards.⁸

A judgment for the plaintiff and an order denying the defendant's motion for a new trial were reversed.

19. INJURY TO PEDESTRIAN FROM FALLING OVER CORD STRETCHED ACROSS A TEMPORARY BRIDGE OVER TRENCH; LIABILITY OF STREET RAILWAY COMPANY FOR DEFECT IN STREET.—In the case of *Schiverea v. Brooklyn Heights R. Co.*, 89 App. Div. 340, 85 N. Y. Supp. 902, it appeared that the defendant street railway company, while engaged in constructing a subway for its electric wires through a public street, entered into a contract with the defendant Gallagher, by which the latter was to do the work of digging the trench and of installing the conduit for the reception of the wires. The contract required that the grade line of the subway should be established by the engineers of the railroad company, but did not specify the manner in which the grade should be indicated. For the purpose of indicating such grade, a cord was adopted which was each morning strung across the street. A footbridge for the use of pedestrians had been constructed across the trench where the subway was being laid. One of the contractor's servants, instead of stretching the cord underneath the footbridge, stretched it about six inches above the surface of the bridge. The plaintiff, while walking across the bridge, tripped over the cord and sustained severe injuries. It was held that both the railroad company and the contractor were liable for the injuries independent of the doctrine of *respondet superior*. The court said: "In the first place, the question of liability of an independent contractor has no application to a case of interference with the

8. As to use of fenders, see *Henderson v. Durham Tract. Co.*, and note (N. C.), 1 St. Ry. Rep. 649; *Carney v. Concord St. Ry. Co.* (N. H.), *ante*, p. 668.

public streets, whether by digging trenches in them or by placing dangerous obstructions upon them. If the accident had occurred because of some negligence in the actual doing of the work of the construction of the subway, such as blasting or digging, or in the actual careless handling of the tools and implements on the part of the contractor's men, the company might be relieved of liability by the existence of an independent contract in the execution of which it had no share or control. But the company assumed a duty imposed on it by law, when it engaged in the work of tearing up a public street, equally whether it embarked in the work itself or engaged a contractor to do it, viz., the duty of keeping the highway in a reasonably safe condition for travel while the work was in progress. That duty it owed to the public, and its liability, when established, rests upon its violation of that duty, and exists although the specific act complained of may have been committed by the independent contractor. *Storrs v. City of Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Brusso v. City of Buffalo*, 90 N. Y. 679; *Turner v. City of Newburgh*, 109 N. Y. 637, 16 N. E. 681; *Deming v. Terminal Railway of Buffalo*, 169 N. Y. 1, 61 N. E. 983, 88 Am. St. Rep. 521; *Downey v. Low*, 22 App. Div. 460, 48 N. Y. Supp. 207; *Johnston v. Phoenix Bridge Co.*, 44 App. Div. 581, 60 N. Y. Supp. 947, affirmed in 169 N. Y. 581, 62 N. E. 1096; *Murphy v. Perlstein*, 73 App. Div. 256, 76 N. Y. Supp. 657; *Ann v. Herter*, 79 App. Div. 6, 79 N. Y. Supp. 825. The same thing is true of the contractor. In taking a contract to dig up a street, he also assumes and is subject to a legal obligation to see to it that the highway is maintained in a reasonably safe condition for public travel. He cannot escape this liability by showing that the mischief was done by a servant of his whom he temporarily loaned to another, for the liability rests upon the failure to discharge the duty which he owes to the public, and not at all upon his obligation to respond for his servant's fault. The cases cited by the learned counsel for the appellant Gallagher on the relation of master and servant have accordingly no application. Gallagher constructed the footbridge as a part of his work, and it was his undoubted duty to keep it in a reasonably safe condition, and he is liable to the plaintiff because he failed to exercise any care in that respect."

A judgment for the plaintiff and an order denying the defendant's motion for a new trial were affirmed.

20. INJURY TO PASSENGER BY SUDDEN START OF CAR WHILE ATTEMPTING TO BOARD IT; ATTEMPTING TO BOARD CAR WHILE IN MOTION; NEGLIGENCE OF MOTORMAN; CONTRIBUTORY NEGLIGENCE.—In the case of *Clinton v. Brooklyn Heights R. Co.*, 91 App. Div. 374, 86 N. Y. Supp. 932, the plaintiff's evidence tended to show that he stood at a point where the defendant's cars were accustomed to stop for the purpose of receiving passengers; that he gave the motorman the signal when the car was about twenty-five feet distant; that the speed of the car was slackened so that it was going as slow as a walk, so that he could step on, but that just as he stepped or

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down the car for the purpose of allowing the plaintiff to board the same; it was further held that it could not be said as a matter of law that the plaintiff was guilty of contributory negligence.

A judgment in favor of the plaintiff and an order denying the defendant's motion for a new trial were affirmed.

- 23. INJURY TO PASSENGER RIDING ON PLATFORM BY BEING THROWN FROM CAR WHILE ROUNDING CURVE; EXCESSIVE SPEED ON CURVE.**—In the case of *Gatens v. Metropolitan St. Ry. Co.*, 89 App. Div. 311, 85 N. Y. Supp. 967, the plaintiff's evidence tended to show that he boarded one of the defendant's electric street cars and stood upon the platform, all the seats and standing room inside the car being occupied;⁹ that the conductor made no objection to his standing upon the platform and collected his fare; that while he was standing upon the platform, with his back to the body of the car, holding on by the hand-rail, the car struck a curve with such force as to break the plaintiff's hold upon the hand-rail and throw him violently into the street; that the plaintiff was unaware of the existence of the curve; that the car was going very fast as it approached the curve, and that its speed had not been slackened when it struck the curve. It appeared that one of the defendant's rules required that the speed of cars rounding curves should be reduced one-half. It was held that the evidence was sufficient to justify a verdict in favor of the plaintiff. The court sustained the proposition that a passenger who has been accepted as such upon the platform of a crowded car may assume that it is a reasonably safe place to ride, and the company owes him the duty of guarding his person from danger, at least in so far as ordinary care will accomplish that result. In respect to the duty of a street railway company to inform its passengers as to the dangers incident to running its cars around a curve, the court cited the case of *Lucas v. Metropolitan St. Ry. Co.*, 56 App. Div. 405, 67 N. Y. Supp. 833, in which the court said:

"The defendant, having permitted the plaintiff to go upon its car, and taken his fare, obligated himself to exercise extraordinary care to transport him to the point of his destination without injury. It could not expose him to unreasonable danger, even though he stood upon the platform of the car. *Graham v. Manhattan R. Co.*, 149 N. Y. 336, 43 N. E. 917. When it was about to run its car around the curve at the speed set out in the record, it owed the plaintiff a duty of informing him of that fact, or indicating to him in some way that he must exercise at that point increased care for his own safety. This the verdict of the jury establishes that the defendant did not do, and the failure to perform this duty, the plaintiff being free from negligence, renders it liable. *Dillon v. Forty-second St. R. Co.*, 28 App. Div. 404, 51 N. Y. Supp. 145; *Schaefer v. Union R. Co.*, 29 App. Div. 262, 51 N. Y. Supp. 431; *Lansing v. Coney Island & B. R. Co.*, 16 App. Div. 146, 41 N. Y. Supp. 120."

9. See *Parks v. St. Louis & Sub. Ry. Co.*, *ante*, p. 527.

In respect to such rule, the court in this case said: "The rule which requires that a passenger who is permitted by a common carrier to occupy a dangerous place for hire to be notified that he is approaching a part of the road where an unusual effort on his part will be required to avert peril which is unknown to him is a salutary one. If no such obligation existed, a very large number of patrons of transportation companies in the city of New York would be exposed to constant danger, and the condition would be fulfilled which Mr. Justice Cullen reprobated in *Dochtermann v. Brooklyn Heights R. Co.*, 32 App. Div. 13, 52 N. Y. Supp. 1051, viz., 'that a carrier may successfully assert that in the usual and proper management of its road a passenger must necessarily and ordinarily risk the safety of his body and bones.'"

24. **INJURY TO PASSENGER RIDING ON STEP OF CROWDED STREET CAR BY BEING THROWN BY MOTION OF CAR.**—In the case of *Moskowitz v. Brooklyn Heights R. Co.*, 89 App. Div. 425, 85 N. Y. Supp. 960, it appeared that the plaintiff was riding upon the step of the platform of a crowded car, and was thrown therefrom by the oscillation or "greyhound" motion of the car as it was running at the usual rate of speed maintained on the portion of the road where the accident occurred. There was no evidence of any unusual or abnormal motion due to any unusual condition of the car, rails, roadbed, or management. It was held that in riding upon the step of the car he assumed the risk ordinarily incident to such a position from the jolts and jars of the moving cars, the unevenness of the track, and the turning of curves. Citing *Ayers v. Rochester Ry. Co.*, 156 N. Y. 104, 50 N. E. 960; *Dochtermann v. Brooklyn Heights R. Co.*, 32 App. Div. 13, 52 N. Y. Supp. 1052; *Francisco v. Troy & Lansingburgh R. Co.*, 78 Hun, 13, 29 N. Y. Supp. 247. The court also laid down the rule that it was not incumbent upon the common carrier of passengers, when a passenger placed himself upon the step of the car, even though it permitted him to ride there as a paying passenger, to reduce the speed of its car from its usual and presumably lawful rate, so that it might lose its then natural oscillation. In considering the cases cited in respect to the assumption of risk by a passenger riding upon the step of a crowded car, the court said:

"Examination of the cases cited in support of a reversal (*McGrath v. Brooklyn, Queens County, etc., R. Co.*, 87 Hun, 310, 34 N. Y. Supp. 365; *Hassen v. Nassau Elec. R. Co.*, 34 App. Div. 71, 53 N. Y. Supp. 1069; *Brainard v. Nassau Elect. R. Co.*, 44 App. Div. 613, 61 N. Y. Supp. 74; *Henderson v. Nassau Elec. R. Co.*, 46 App. Div. 280, 61 N. Y. Supp. 690; *Lucas v. Metropolitan St. R. Co.*, 56 App. Div. 405, 67 N. Y. Supp. 833; *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135, 93 Am. Dec. 495; *Ginna v. The Second Ave. R. Co.*, 67 N. Y. 596; *Nolan v. Brooklyn City & N. R. Co.*, 87 N. Y. 63, 41 Am. Rep. 345; *Graham v. Manhattan R. Co.*, 149 N. Y. 336, 43 N. E. 917; *Hastings v. Central Croastown R. Co.*, 7 App. Div. 312, 40 N. Y. Supp. 93; *Dillon v. Forty-second St. R. Co.*, 28 App. Div. 404, 51 N. Y. Supp. 145) shows an essential difference,

not only in the facts, of course, for all cases thus differ, but in the essential fact which brought home negligence to those defendants, and which fact respectively has no similar basic fact in the case at bar. But instead of paragraphic comments upon each case, perhaps I may thus more briefly indicate the discriminations: In McGrath's case, the accident was due to speed which produced violent and unequal motion. This was established by several witnesses, and people were shaken around and off their seats. In Hassen's case, the motorman should not have applied excessive motor power suddenly, so as to cause a sudden violent jerk. In Henderson's case, the driver should not have driven his car so as to cause violent contact between the passenger and the van on the highway. In Lucas' case, when the driver intended to turn a curve at 'terrible speed,' the passenger should have been warned at that point that he must increase his caution. In Clark's case, the driver could have stopped in time to avoid imminent collision, and should not have driven on into danger. In Ginna's case, the switch was left open, so that the car ran off upon it, producing a violent jolt or shock. In Nolan's case, the driver should not suddenly have whipped one of the horses so that it plunged terribly under the blow, first forward and then to one side. In Graham's case, the defendant should not have disobeyed the statute as to gates and the closing of them, nor should its servant have conducted himself so as to cause the crowd to sway and jostle the plaintiff, so that he must grasp the railing and hence suffer injury. As Martin, J., says:

"Even if the plaintiff assumed the ordinary risk which attended riding on the platform, he had a right to assume that the defendant's servants would cause no unusual disturbance of the crowd, and that the cars were so constructed as not to render his position dangerous from their proximity to each other in passing over any portion of the road, or at least if such danger existed, that he would be apprised of it."

"In Hastings' case, the driver should not have given the horse a sudden blow with the whip, which caused him to plunge forward so as to carry the car off the track. In Dillon's case, the driver should not have driven the car at a rapid rate when he struck the temporary turnout with violence.

"I do not understand the rule to be that there is any implied assurance that the car will be run so as to make it safe in the sense that such assurance is insurance, but that the obligation is that of a high degree of care, and I do not believe that this obligation assures the plaintiff against the risks ordinarily incident to his place, due to the jars and jolts natural and normal to the progress of the car, when its rate of speed is not shown to be unlawful or negligent *per se*. I think that the plaintiff cannot be heard to say, 'I was thrown off the car, therefore the rate of speed was negligence,' and so insist that he was thereby given some proof of actionable neglect. *Francisco v. Troy & Lansingburgh R. Co., supra*. I do not construe the language of the *Dochter-*

mann case in any sense to the contrary. In the sentence, 'Now, while it is not negligence *per se* to stand on the platform of a street car, it is but fair and reasonable that the person so riding should assume the risk ordinarily incident to such a position,' etc., I think that the expression 'so riding' refers to a person standing on the platform, and, as thus standing, riding on the platform; i. e., that the force of 'so' is confined to this sentence, and does not refer to the prior sentence, so as to mean not only a person voluntarily and without necessity riding on the platform, as referred to by the learned justice who wrote in that case. Moreover, it may be said that this plaintiff voluntarily rode there. He exercised his free will when he chose to take the only position which was open to him. There was necessity for riding there if he wished to travel on that particular car, but, nevertheless, he voluntarily became a passenger in it. Finally, the plaintiff was not riding on a platform, but on a step, which the Court of Appeals, in Nolan's case, *supra*, say 'was a position palpably more dangerous than riding on a platform.' Indeed, in *Francisco v. Troy & Lansingburgh R. Co.*, *supra*, the court say that the court in Nolan's case held clearly, by implication, that such a position was negligence *per se*."

A judgment for the defendant entered upon the dismissal of the plaintiff's complaint by the direction of the court was affirmed (Hirschberg and Woodward dissenting).

25. INJURY TO PASSENGERS; DUTY OF COMPANY WHERE PASSENGERS ARE PERMITTED TO STAND UPON RUNNING-BOARDS OF OVERCROWDED CARS.—In the case of *Sheeron v. Coney Island & Brooklyn R. Co.*, 89 App. Div. 336, 85 N. Y. Supp. 958, it appeared that the plaintiff was a passenger on a crowded open trolley car operated by the defendant, and was riding upon the running-board. He was thrown or fell under the wheels of the car and killed. The issue tried before the jury was whether a violent jerk and accompanying accelerated speed of the car threw him off as he was standing upon the running-board and holding on by the stanchion with both hands, as contended by the plaintiff, or whether, as contended by the defendant, he was seated in the body of the car, but under the influence of liquor, and voluntarily got up and either jumped off the car or fell, or was pushed off. It was held that the conclusion reached by the jury that the company was negligent was fully sustained by the evidence. There being evidence tending to show that the plaintiff was permitted to ride upon the running-board of an overcrowded car, and that the decedent fell from the car coincidentally with a jerk, and with the accelerated speed of the car, it was proper to submit the question of the negligence of the respective parties to the jury. The rule was laid down that where a common carrier accepts passengers upon the platforms or the running-boards of overcrowded cars, there is an implied assurance that such places are reasonably safe, and a corresponding duty to so operate the cars as to maintain such a condition of safety. Citing *McGrath v. Brooklyn, Q. C. & S. R. Co.*, 87 Hun, 310,

34 N. Y. Supp. 365; *Francisco v. Troy & Lansingburgh R. Co.*, 88 Hun, 464, 466, 34 N. Y. Supp. 859; *Wood v. Brooklyn City R. Co.*, 5 App. Div. 492, 38 N. Y. Supp. 1077; *Miles v. King*, 18 App. Div. 41, 45 N. Y. Supp. 379; *Grotsch v. Steinway Ry. Co.*, 19 App. Div. 130, 45 N. Y. Supp. 1075; *Schaefer v. Union Ry. Co.*, 29 App. Div. 261, 51 N. Y. Supp. 431; *Dochtermann v. Brooklyn Heights R. Co.*, 32 App. Div. 13, 52 N. Y. Supp. 1051; *Henderson v. Nassau Elec. R. Co.*, 46 App. Div. 280, 61 N. Y. Supp. 690; *Lucas v. Metropolitan St. R. Co.*, 56 App. Div. 405, 62 N. Y. Supp. 833; *Eberhardt v. Metropolitan St. R. Co.*, 69 App. Div. 560, 75 N. Y. Supp. 46; *Clark v. Eighth Avenue R. Co.*, 36 N. Y. 135, 93 Am. Dec. 495; *Sauter v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 50, 23 Am. Rep. 18; *Ginna, Adm'r v. Second Avenue R. Co.*, 67 N. Y. 596; *Nolan v. Brooklyn City & Newtown R. Co.*, 87 N. Y. 63, 41 Am. Rep. 345; *Bartholomew v. N. Y. & H. R. Co.*, 102 N. Y. 716, 7 N. E. 623; *Graham v. Manhattan R. Co.*, 149 N. Y. 336, 43 N. E. 917.

26. **DEATH OF PASSENGERS; EVIDENCE AS TO RECOMMENDATION OF STATE BOARD OF RAILROAD COMMISSIONERS AS TO SAFEGUARD.**—In the case of *Baruth v. Poughkeepsie City & Wappinger's Falls Elec. Ry. Co.*, 89 App. Div. 324, 85 N. Y. Supp. 822, it appeared that the plaintiff's intestate was a passenger on one of the defendant's electric cars which was traveling down a hill in the city of Poughkeepsie; that there was slush and snow upon the track, and the motorman was unable to control the car, in consequence of which the car attained such a headway that when it reached the end of the track it was derailed and went over a dock into the Hudson river, killing the intestate. Evidence was offered to the effect that more than a year prior to the accident the State board of railroad commissioners, after an official inspection of the defendant's road, recommended the placing of a large timber across the end of the track near the river as a safeguard. The court excluded the testimony as incompetent under section 162 of the Railroad Law providing that no examination, request, or advice of the board of commissioners shall impair in any manner or degree the legal rights, duties, or liabilities of a railroad corporation. It was held that such testimony was competent.

A judgment for the defendant and an order denying a new trial were reversed.

27. **INJURY TO PASSENGER THROWN DOWN WHILE STANDING IN STREET CAR BY VIOLENT JERK; 10 INSTRUCTION AS TO SUDDEN STARTING OF CAR; PROXIMATE CAUSE.**—In the case of *Goodkind v. Metropolitan St. Ry. Co.*, 93 App. Div. 153, 87 N. Y. Supp. 523, the plaintiff testified that he was a passenger upon one of the defendant's street cars. He was standing in the car holding on to a strap provided for that purpose, and the car, after coming to a stop, started with a violent jerk, which caused him to lose his hold upon the strap and to be thrown down and injured. It was held

10. See note to *Ilges v. St. Louis Transit Co.*, ante, p. 586.

that an instruction that if the jury find the accident to have happened in the manner described by the plaintiff and his witnesses, "then the plaintiff would be entitled to a verdict," was erroneous since it permitted the jury to find the defendant liable, without finding that it had been guilty of negligence, or that such negligence was the proximate cause of the accident, or that the plaintiff was free from contributory negligence. It was held that the fact that the car had started with a jerk, and that it could have been started without a jerk did not establish, as a matter of law, that the defendant had been guilty of negligence; this question was one of fact for the jury to determine. In this connection the court said: "Where the liability of a defendant is based upon negligence, to establish such liability the jury must find that the injury was caused by the negligence of the defendant, and it is error for the court to charge as a matter of law that, if the facts are as testified to by the plaintiff's witness, the plaintiff is entitled to a verdict. *Kellegher v. Forty-second St. Ry. Co.*, 171 N. Y. 309, 63 N. E. 1096. The application of the maxim *res ipsa loquitur*¹¹ will, under certain circumstances, sustain a finding of negligence, but this is simply an application of the principle that a fact may be proved by circumstantial evidence. Where that maxim is applicable, there must still be a finding of negligence by the jury, based upon competent evidence, to entitle the plaintiff to a verdict; and the question as to whether negligence existed is a question which must be determined by the jury, and not by the court as a matter of law. This rule has been constantly reiterated in this court and in the Court of Appeals. It is quite proper for the court to instruct the jury that, if they find that a certain condition existed, then a question as to whether the defendant was or was not guilty of negligence is presented for their consideration, and a finding that the defendant was guilty of negligence would be sustained. But that is a very different proposition from a statement to the jury that, if they find certain facts, the plaintiff is entitled to a verdict. In such a direction the jury are charged as a matter of law that the facts stated constitute negligence, instead of leaving the question as to whether there was negligence for the jury to determine."

28. INJURY TO PASSENGER CAUSED BY COLLISION WITH VEHICLE; NEGLIGENCE OF DRIVER OF VEHICLE; INSTRUCTIONS.—In the case of *Frank v. Metropolitan St. Ry. Co.*, 91 App. Div. 485, 86 N. Y. Supp. 1018, the plaintiff was a passenger upon one of the defendant's cars. The car overtook a wagon being driven along the avenue in the same direction as the car and forced the wagon against one of the pillars of an elevated railroad, in such a manner that the car came to a sudden stop and the plaintiff was thrown against the woodwork of the car, causing the injuries complained of. The complaint alleged that the injury was "occasioned

11. See note, *Smith v. Mil. Elect. Ry. & L. Co.*, *post*, p. 962, and *Palmer v. Warren St. Ry. Co.*, *post*, p. 839.

entirely through the fault, neglect, and want of care on the part of the defendant, its agents and servants, and not through any fault, neglect, or want of care on the part of the plaintiff." This complaint was construed as meaning that the negligence of the defendant without any contribution on the part of the plaintiff was responsible for the accident. The defendant's contention that the plaintiff's allegation limited her to proof that the accident was due solely to the negligence of the defendant, and that if it could be shown that the injury was caused by the negligence of the driver of the vehicle the plaintiff's right to recover would be defeated, was not sustained. The fact that some third person may have contributed to the defendant's negligence does not relieve it from responsibility. The question is, did the defendant by its negligence injure the plaintiff without contributory negligence on her part, and upon this issue the question of the paramount right to the use of its tracks as between the defendant and the driver of the wagon with which the car collided has no bearing whatever, so long as the negligence of the defendant caused the injury to the plaintiff. A charge to the jury, therefore, that if the driver of the wagon was negligent and the motorman of the defendant was also negligent, and his negligence concurred with the negligence of the driver of the wagon, then the defendant is liable is correct.

A judgment for the plaintiff and an order denying the defendant's motion for a new trial were affirmed.

29. INJURY TO PASSENGER CAUSED BY COLLISION OF STREET CAR WITH ANOTHER CAR ATTEMPTING TO PASS A CROSSOVER SWITCH; LIABILITY OF COMPANY OWNING RAILROAD AND OF ANOTHER USING IT UNDER TRAFFIC AGREEMENT; PRESUMPTION OF NEGLIGENCE.¹²—In the case of *Klinger v. United Traction Co. and Schenectady Ry. Co.*, 92 App. Div. (N. Y.) 100, 87 N. Y. Supp. 864, it appeared that the defendant United Traction Company operated a double-track railway in the city of Albany and the defendant Schenectady Railway Company operated its cars over the other company's tracks under an agreement that the other company should keep the track and switches in repair. The United Traction Company was repairing a portion of its west-bound track and both east and west-bound cars were obliged to use the east-bound track. The plaintiff was a passenger on a car of the United Traction Company bound westward. Such car had crossed over the east-bound track, while the east-bound car of the Schenectady Company had been transferred to the west-bound track and had stopped with its east end about ten feet west of the west end of the crossover switch. The switch was adjusted so that the Schenectady car could run easterly on the west-bound track, so as to permit the United Traction Company car to pass over to that track and continue westwardly thereon. The motorman of the Schenectady car started it by letting off the brake, and the front

12. See note to *Palmer v. Warren St. Ry. Co.*, *post*, p. 839.

truck passed the tongue of the switch, but the rear truck took the switch, throwing the rear end of the car against the traction company's car, injuring the plaintiff. It was held that a judgment against both defendants should be affirmed. In stating the law applicable to the case the court declared the following propositions:

(1) That the plaintiff, being a passenger on one of the traction company's cars, that company was bound to use the utmost human skill and foresight with reference to maintaining, operating, and keeping in repair its tracks and switches, in order to save him from harm.

(2) That it was not incumbent upon the plaintiff to show the cause of the displacement of the switch which contributed to the injury; that under the doctrine of *res ipsa loquitur* the traction company was required to explain the cause of the displacement in order to relieve itself from the presumption that its negligence caused the accident.

(3) The Schenectady Company was only bound to use ordinary and reasonable care with respect to the circumstances confronting it at the time, to avoid the injuries to the plaintiff; that the relation which such company bore to the plaintiff was the same as if he had been driving upon the street instead of being a passenger upon one of the traction company's cars.

(4) That in view of the evidence tending to show the heavy grade and the weight of the Schenectady car and the knowledge of the motorman that the switch was not fitted with appliances to hold the tongue in place, and that, when running against the point of the tongue instead of against the heel thereof, he was using the switch in a manner in which it was not intended to be used, reasonable and ordinary care required the motorman to proceed very slowly and to keep his car under control.

A judgment for the plaintiff against both defendants, and orders denying the defendants' motion for a new trial were affirmed.

30. INJURY TO PASSENGER FROM BURNS RECEIVED FROM A FLOOR PLATE HEATED BY FRICTION CAUSED BY THE OVERCROWDING OF A STREET CAR; ALLEGATION AS TO CAUSE OF INJURY.—In the case of *Powell v. Hudson Valley Ry. Co.*, 88 App. Div. 133, 84 N. Y. Supp. 337, it appeared that the plaintiff was injured by burns received from a floor plate above one of the wheels of the car which had become heated by being pressed down upon such wheel. It was held that the duty owed by the defendant to its passengers being to use the utmost diligence and care for their protection, the heating of the plate raised a presumption of a failure to exercise such care.

It was alleged in the complaint that the negligence consisted in the defendant's permitting the bearing upon one of the wheels to become overheated. The proof was that the bearings were not overheated, but that the plate over the wheel was overheated by reason of the friction caused by the plate being pressed down upon the wheel. It was held that since the precise cause of the accident was known to the street railway com-

pany and not to the passenger, a recovery by the latter should not be set aside, since the variance between the pleading and proof in no way misled the defendant.

The defendant street railway company was formed by the consolidation of two companies. The complaint alleged that the accident occurred upon the line operated by one of the companies, while the proof established the fact that the accident occurred upon the line of the other; it was held that this did not constitute a variance requiring the reversal of a judgment in favor of the injured passenger.

A judgment for the plaintiff and an order denying the defendant's motion for a new trial were affirmed.

31. INJURY TO PASSENGER OF HORSE CAR BY KICKING HORSE; PROXIMATE CAUSE.—In the case of *Roedecker v. Metropolitan St. Ry. Co.*, 87 App. Div. 226, 84 N. Y. Supp. 300, the plaintiff, who was a passenger on a horse car of the defendant, riding on the front platform, was injured by being kicked by one of the horses. The evidence tended to show that the horse car driver negligently drove his horses so fast that one of them fell; that the car ran up to the fallen horse and over his hind quarters, preventing him from rising; that the driver and some other persons pushed the car back from the horse, and that as the horse's feet became free, he kicked violently before rising, striking the plaintiff, and seriously injuring him. The evidence did not show any negligent act, for which the defendant would be liable, after the horse had fallen. It was held that the negligence of the driver in causing the horse to fall was not the proximate cause of the plaintiff's injury, and that, therefore, the defendant was not liable.

32. INJURY TO PASSENGER; INSTRUCTION AS TO DEGREE OF CARE.—In the case of *Kelly v. Metropolitan St. Ry. Co.*, 89 App. Div. 159, 85 N. Y. Supp. 842, the plaintiff, while a passenger on one of the defendant's street cars, was injured by the shaft of an express wagon puncturing the side of the car while it was in motion. It was held error for the court to charge the jury that it was the duty of the defendant to use the "highest degree of care" for the safety of the plaintiff, and the defendant is entitled to a charge that it was only obliged to use a "high degree of care."

A judgment in favor of the plaintiff and an order denying the defendant's motion for a new trial were reversed.

33. INJURY TO PASSENGER CAUSED BY OVERCROWDING STATION PLATFORM.—In the case of *Dittman v. Brooklyn Heights R. Co.*, 91 App. Div. 378, 86 N. Y. Supp. 878, it appeared that the defendant's trains were started from a platform on the Brooklyn bridge to which only passengers were admitted who had paid their fare; the plaintiff, on paying her fare, was admitted to the platform and obliged to wait a considerable time for a train; when she first reached the platform there were but a few people upon it, but before the train arrived a crowd of passengers had collected so dense that there was no room to move; the plaintiff stood

within a foot of the edge of the platform, and when the train finally came, she was pushed by the crowd with considerable force against the side of the car, where she was held a moment or two, and was then thrown by the crowd violently into the car, sustaining severe injuries. It was held that the question as to whether or not the defendant was guilty of negligence in selling tickets and permitting passengers to crowd upon the platform in such numbers as to render their movements uncontrollable was one for the jury.

A judgment in favor of the plaintiff and an order denying the defendant's motion for a new trial were affirmed.

34. **ASSAULT UPON PASSENGER; 13 AGGRAVATING CONDUCT OF PASSENGER TO BE CONSIDERED IN DETERMINING COMPENSATORY DAMAGES.**—In the case of *Freedman v. Metropolitan St. Ry. Co.*, 89 App. Div. 486, 85 N. Y. Supp. 986, it was sought to recover for an assault committed upon the plaintiff by the conductor of one of the defendant's street cars, while he was a passenger thereon. It appeared from the plaintiff's evidence that the conductor had used vile and blasphemous language toward him and his wife, and when the plaintiff remonstrated he laid his hands upon the plaintiff and the plaintiff endeavored to remove them, whereupon the conductor struck him in the mouth, knocking out several of his teeth. The defendant's testimony was to the effect that the conduct of the plaintiff was such as to aggravate the conductor into making the assault. The court in charging the jury said that even if the jury found that the conduct of the plaintiff was such as to aggravate the conductor into making the assault, such conduct could not be taken into consideration in fixing the amount of the plaintiff's compensatory damages, but only in mitigation of punitive or exemplary damages. This was held to be reversible error.

A judgment for the plaintiff and an order denying the defendant's motion for a new trial were reversed.

35. **INJURY TO EMPLOYEE IN CAR SHED; CONTRIBUTORY NEGLIGENCE.**—In the case of *Mullen v. Metropolitan St. Ry. Co.*, 89 App. Div. 21, 85 N. Y. Supp. 134, the plaintiff sued for personal injuries sustained by him while employed by the defendant in its car storage depot. It appeared that there were a number of tracks in the depot upon which the street cars were run in and out. The space between the two rails of each track was left open, forming pits four feet six inches deep, four feet nine inches wide, and one hundred feet long. On the outside of each rail of each track a platform had been constructed upon uprights, which also furnished support for the car rails. The plaintiff had been employed in this place for about two months. During part of this time he was engaged in attaching movable wires to the cars for the purpose of running them in and out upon the tracks. He was directed by the foreman of the depot to go into one of the pits to instruct another employee how to

13. See note to *Birmingham Ry., L. & P. Co. v. Mullen*, *ante*, p. 5.

wire out the cars. He descended into the pit and applied the movable wire to the car and walked along with the car for a few yards when he stumbled over a transverse wall built across the pit and was injured. The plaintiff testified that he had no knowledge of the location of such transverse wall, did not know of its existence, and had not been informed thereof. Electric lights were in the pits which could be turned on when required, but the plaintiff testified that he did not know how to use them and had received no instructions concerning them; the plaintiff also testified that it was dark underneath the car and that he could not see. But it appeared that the accident occurred about 2 o'clock on a March afternoon; that the pit beyond the car was entirely open to the light; that practically the whole front of the building was open, and that there were windows in the sides thereof, making that part of the pit not covered by the car light and open. It was held that it was apparent from the physical conditions existing at the time of the accident that although it was dark underneath the car, the transverse wall over which the plaintiff stumbled was in the light at the time the car started, and that the plaintiff could, by using reasonable diligence, have discovered it; that, therefore, a judgment entered upon a verdict in favor of the plaintiff should be reversed.

36. INJURY TO EMPLOYEE BY START OF TROLLEY CAR WHICH HE WAS REPAIRING; FAILURE TO PROMULGATE RULES; CAR REPAIRER AND CAR STARTER ARE NOT FELLOW SERVANTS.¹⁴— In the case of *Quinn v. Brooklyn Heights R. Co.*, 91 App. Div. 489, 86 N. Y. Supp. 883, it appeared that the plaintiff, a car repairer, was engaged in repairing a trolley car in the repair shop of the defendant; that he left the car for a few moments for the purpose of getting a piece of material to be used in his work, and, on returning, resumed work without looking to see whether or not the trolley pole was in contact with the wire; subsequently, and without warning to the plaintiff, a motorman, acting under the direction of the car starter, moved the car, and it passed over the plaintiff's foot, causing the injuries complained of. The plaintiff alleged negligence in that the company had failed to promulgate rules for his protection while engaged in his work as a car repairer, and in that the defendant failed to warn him of an intention to move the car. The printed rules of the defendant contained no provisions in reference to car repairs. There was evidence, however, tending to show that the defendant's foreman adopted rules from time to time, which he recorded in a book kept in his office. These rules were changed at intervals by the foreman and were not accessible to all the employees by posting or publication. The foreman claimed, but the plaintiff denied, that these rules had been signed by the plaintiff. The court held that the plaintiff could not be bound by the special rules promulgated by the defendant's foreman as soon as it

14. As to fellow-servant rule as applied to street railway employees, see *Chicago City Ry. Co. v. Leach*, *ante*, p. 156.

was shown that such rules were brought to the plaintiff's knowledge. It appearing that the printed rules made no provision looking to the plaintiff's safety, the question as to whether the defendant had exercised reasonable care to provide the plaintiff a reasonably safe place and reasonable protection in the performance of obviously dangerous work was for the jury. It was also held that the failure of the plaintiff to look to see whether the trolley pole had been replaced on the wire after he returned from getting the piece of material did not constitute contributory negligence as a matter of law.

The car starter and the car repairer were held not fellow servants within the rule which exempts the master from liability for the negligence of coservants. Evidence tending to show that the car was known to have been out of repair by one who had power to direct the acts of the plaintiff, and that if there had been any inspection to determine the fitness of the car for service, it would have been found that the plaintiff had not yet completed the repairs, but was actually performing the work, was evidence of negligence on the part of the car starter, standing in place of the master, which, in connection with other facts and circumstances, might justify a verdict for the plaintiff.

A judgment for the plaintiff and an order denying the defendant's motion for a new trial were affirmed.

- 37. INJURY TO EMPLOYEE OILING CABLE WHEELS; ASSUMPTION OF RISK.**—In the case of *Ryan v. Third Ave. R. Co.*, 92 App. Div. 306, 86 N. Y. Supp. 1070, the plaintiff was engaged in oiling and replacing wheels upon which a cable ran, used by the defendant in the operation of its street railroad. In order to perform his duties, it was necessary for him to go into an opening between the rails under the surface of the street called a "pot-hole." It was necessary for a person so employed to get out of the hole upon the approach of a car. The plaintiff was employed as a foreman's helper, and in the performance of his duties was subject to the foreman's direction. While the plaintiff was engaged in his work, the foreman stood near the hole to warn the plaintiff of the approach of cars in time for him to get out and enable them to pass. The plaintiff testified that, in consequence of the failure of the foreman, who was standing guard, to warn him of the approach of a car, he was struck by the car while attempting to get out of the hole. It was admitted that the foreman was a competent person to guard the hole. It was held that, the employment being dangerous, the plaintiff assumed the risks thereof, among which was the risk that the foreman might become inattentive, careless, and neglectful of his duties, and omit to give the warning when required; that, when the defendant had stationed a competent person to guard the hole while the plaintiff was working therein, it had discharged its entire duty with respect to the plaintiff, and it was not liable for the failure of the foreman to warn the plaintiff of the approach of the car.

A judgment for the plaintiff and an order denying the defendant's motion for a new trial were reversed.

38. INJURY TO CONDUCTOR BY NEGLIGENCE OF MOTORMAN; NOTICE OF PETENCY OF FELLOW SERVANT; ASSUMPTION OF RISK.—In the *White v. Lewiston & Youngstown Frontier Ry. Co.*, 94 App. Div. N. Y. Supp. 901, it appeared that a conductor was injured by being thrown from the rear platform of a car which ran off the end of defendant's tracks at a terminal, because of the negligence of the motorman in failing to stop the car. The negligence of the defendant relied upon was the employing and continuing in its employ an incompetent motorman, knowing him to be such. It was proved that the motorman was intoxicated at the time of the accident; that there was another employee on the front platform with him also under the influence of liquor; that the power was under the control of this other employee. It was contended that, except for the intoxication of the motorman, any other employee would not have been permitted to have handled the car at this place. It appeared that the plaintiff had knowledge of the temperate habits of the motorman. It was held that, the motorman's incompetency being known by the plaintiff, he assumed the risk by continuing with him, and could not, therefore, recover for his negligence. The plaintiff's testimony as to the conversation had by the plaintiff's wife with the defendant's superintendent as to his knowledge before the accident of the intemperance of the motorman was held incompetent as original evidence of notice.

A judgment for the plaintiff and an order denying a motion for a new trial were reversed.

39. INJURY TO LABORER WORKING IN STREET BY DERAILMENT OF CAR INSTRUCTION AS TO DUTY OF DEFENDANT IN CONSTRUCTION OF TRACKS AND CAR TRACKS.—In the case of *Kelly v. United Traction Co.*, Div. 234, 85 N. Y. Supp. 433, the plaintiff's intestate, while engaged in laying brick on the sidewalk of a public street, was struck and injured by one of the defendant's cars, which ran off the track. An instruction to the effect that it was the duty of the defendant to have its cars equipped with its apparatus, and the roadbed and rails so constructed and placed that the car would stay on the tracks was held erroneous, as eliminating the question of the degree of care which the defendant was required to exercise, and practically stating that the company was an insurer against accidental derailment. The fact that the court, both before and after giving the erroneous instruction, correctly charged that the opening of the accident did not render the defendant liable, but that the plaintiff was obliged to prove that the derailment of the car was caused by the defendant's negligence, does not render the erroneous instruction harmless, where it appears that, at the close of the charge, the erroneous instruction was prominently called to the attention of the jury and that the trial judge then refused to modify it.

A judgment for the plaintiff and an order denying the defendant's motion for a new trial were reversed.

- 40. UNAUTHORIZED CONSTRUCTION AND OPERATION OF STREET RAILWAY IN HIGHWAY; RIGHTS OF ABUTTING OWNER.**¹⁵—In the case of *Henning v. Hudson Valley Ry. Co.*, 90 App. Div. 492, 85 N. Y. Supp. 1111, it was held that a street railway company which operates its railway in a town highway without the consent of the public authorities, and of the abutting owners, is a trespasser. An abutting owner, although he has no title to any part of the street itself, has a sufficient special interest therein to entitle him to an injunction restraining the street railway from operating its road. Even if it were held that his being an abutting owner did not give him such an interest as to entitle him to an injunction, the fact that the railway is laid within three feet of the curb on his side of the street, and that the cars operated over the railroad extend to within six or eight inches of the curb, thus imposing upon the driver of any vehicle stopping before his premises the necessity of being constantly on the lookout for approaching cars, and constituting a danger to those passing in and out of the abutting owner's premises, gives such owner a special interest authorizing him to ask for an injunction.

A judgment enjoining the defendant from operating its roads in certain parts of the highways in the village and town of Saratoga Springs was modified, and as modified affirmed.

- 41. RIGHT OF STREET RAILWAY TO CONDEMN FEE OF ABUTTING OWNERS IN STREET.**—In the case of *Schenectady Ry. Co. v. Peck*, 88 App. Div. 201, 84 N. Y. Supp. 759, it was held that section 90 of the Railroad Law, as amended by Laws 1895, chapter 933, providing that "nothing in this section shall be deemed to authorize a street railroad corporation to acquire any real property within a city by condemnation" was not intended to prevent a street surface railroad company from acquiring in condemnation proceedings the right to build its road upon a public street, the fee of which is vested in the abutting owners, but was intended to relate only to private property.

A judgment for the petitioner in condemnation proceedings was affirmed.

- 42. DAMAGES RECOVERABLE AGAINST ELEVATED RAILROAD COMPANY BY LESSEE OF ADJOINING PREMISES; OPERATION OF RAILROAD AT TIME LEASE WAS EXECUTED.**—In the case of *Child v. New York Elevated R. Co.*, 89 App. Div. 598, 85 N. Y. Supp. 604, it appeared that the plaintiff was the owner of buildings erected upon certain lots in the city of New York under a lease from the owner of such lots for a period of twenty-one years. The lease contained no covenant of renewal, but authorized the lessor to remove the buildings at the expiration of the term. The plaintiff sought to recover damages to his buildings and leasehold estate by the construction and operation of the defendant's elevated railroad in front of the premises. Prior to the expiration of the term of his lease he obtained a

15. As to rights of abutting owners generally, see note, 1 St. Ry. Rep. 318. See cases cited in note to *South Bound R. Co. v. Burton*, *post*, p. 867.

new lease for a term of five years, to commence upon the expiration of the prior term. Before the making of the new lease the defendant obtained from the plaintiff's lessor a grant of the easements of light, air, and access appurtenant to the premises. It was held that the plaintiff was not entitled to injunctive relief, and that he could not recover damages from the operation of the railroad during the term of the five years' lease, for the reason that it would be presumed that such lease fixed the rental value with a view to the fact that the elevated railroad was being operated in front of the premises.

The judgment appealed from was modified by reducing the judgment for rental damage, interest, cost, and allowance, and as so modified was affirmed.

43. **ENFORCEMENT OF STATUTORY PENALTY FOR EXCESSIVE FARE.**—In the case of *Goodspeed v. Ithaca St. Ry. Co.*, 88 App. Div. 147, 84 N. Y. Supp. 383, the plaintiff sued to recover the statutory penalty prescribed by section 39 of the Railroad Law for the charging of a rate of fare in excess of that prescribed. Such section provides that the penalty is not to be incurred if "such overcharge was made through inadvertence or mistake, not amounting to gross negligence." It was held that, where under such section an excessive rate was charged, under the assumption that the company had the right to fix such rate, the penalty was not incurred, since the overcharge was made in good faith, and without gross negligence.

A judgment for the defendant, entered upon a dismissal of the plaintiff's complaint, was affirmed.

44. **PENALTY FOR FAILURE TO FURNISH TRANSFER SLIP; WANT OF TICKETS BY CONDUCTOR IS NOT A DEFENSE.**¹⁶—In the case of *Rosenberg v. Brooklyn Heights R. Co.*, 91 App. Div. 580, 86 N. Y. Supp. 871, it was sought to recover the statutory penalty for failure to furnish a passenger with a transfer ticket. It was held that the fact that at the time the passenger asked for the transfer ticket the conductor of the car did not have any transfers left, will not, as a matter of law, absolve the street railway company from liability. In such an emergency the conductor should, upon request, furnish the passenger with a slip stating that he had paid his fare, or make an oral explanation to the conductor of the car to which the passenger desires to be transferred.

A judgment for the plaintiff and an order denying the defendant's motion for a new trial were affirmed.

16. As to transfers generally, see note to *City of Montpelier v. Barre & M. T. & P. Co.*, *post*, p. 911.

Hamilton, G. & C. Traction Co. v. Hamilton & L. Electric Transit Co.

(Ohio — Supreme Court.)

RIGHT OF WAY; CONFLICTING GRANTS; INJUNCTION.—When a city council has, by ordinance, legally granted to one street railway company the right to construct its railway and lay its track on and over a particular part of a designated street within said city, and such company has duly accepted said grant, and entered upon and taken possession of the right of way so specifically granted, a subsequent grant by said city council,¹ or its successor in office, the board of control, of the same right of way, or a substantial part thereof, to another street railway company, for like purposes, will not of itself confer upon the second grantee the right to enter upon and take possession of the route or right of way so granted, where such entry and possession by it will materially and injuriously interfere with, interrupt, and abridge the first grantee's use and enjoyment of the said right of way. And where said second grantee threatens and is about to take possession of said route and right of way under and by virtue of its said grant, without the consent and against the will of said first grantee, and without having appropriated the right so to do, it will be restrained from so doing by injunction.

(Syllabus by the court.)

ERROR by defendant from judgment for plaintiff. Decided January 10, 1904.
Reported (Ohio St.) 69 N. E. 991.

On the 4th day of August, 1891, the city council of Hamilton, Ohio, by ordinance duly passed, granted to the Hamilton & Lindenwald Electric Transit Company, defendant in error, the right to construct, operate, and maintain an

1. As to grant of exclusive use of street to a street railway company, see *Russell v. Chicago & Milwaukee Elec. Ry. Co.*, 2 St. Ry. Rep. 100, (Ill.) 68 N. E. 727. As to determination of rights of railroads to conflicting easements in streets, see *West Jersey, etc., R. Co. v. Atlantic City & Sub. Trac. Co.*, 2 St. Ry. Rep. 717, (N. J. Eq.) 56 Atl. 890.

While a franchise cannot be granted to a street railway company for the use of a city street to the exclusion of other similar uses of the same street (*Market St. R. Co. v. Central R. Co.*, 51 Cal. 583; *Des Moines St. R. Co. v. Des Moines Broadgauge St. Ry. Co.*, 73 Iowa, 513, 33 N. W. 610; *Brooklyn City & N. R. Co. v. Coney Isl. & B. R. Co.*, 35 Barb. (N. Y.) 364; *Parkhurst v. City of Salem*, 23 Oreg. 371, 32 Pac. 304; *Nellis Street Surface Railroads*, p. 114), unless it is otherwise provided by ample statutory or constitutional authority (*Homestead St. Ry. Co. v. Pittsburgh & H. Elec. St. Ry. Co.*, 166 Pa. St. 162, 30 Atl. 950, 27 L. R. A. 383), it is nevertheless to

electric street railroad in, upon, and along East avenue from Grand boulevard to John street, and beyond, within said city, and in pursuance to said grant the city authorities located said street railroad in the central portion of said East avenue. In accordance with said grant and location, the defendant in error immediately thereafter constructed in said central portion of said East avenue an electric street railroad with a gauge of four feet eight and one half inches, and in accordance with the terms and conditions of said ordinance it has ever since been and is now engaged in operating and maintaining its said street railroad in, upon, and along the central portion of said avenue. The franchise so granted to said street railroad was for a term of twenty-five years and the same is still in full force, effect, and operation. On the 22d day of September, 1901, the board of control of the city of Hamilton, Ohio, which board was and is the successor of said city council, passed an ordinance granting to the plaintiff in error, the Hamilton, Glendale & Cincinnati Traction Company, the right to construct, maintain, and operate a street railroad in, upon, and along said East avenue from Grand boulevard to John street, and by the terms and conditions of said last-named ordinance said Hamilton, Glendale & Cincinnati Traction Company was to construct its tracks with a gauge of five feet two and one-half inches, said tracks to be laid as near the center of said East avenue as practicable, the rails of its said track being

be accepted as the true doctrine that where a street railway company has, under its franchise, laid its tracks in a street, a subsequent franchise cannot be granted authorizing the use of such tracks without just compensation to the owner of such tracks.

Rights of prior grantee.—In the case of Indianapolis Cable St. R. Co. v. Citizens' St. R. Co., 127 Ind. 369, 24 N. E. 1054, 8 L. R. A. 539, it was held that where two or more street railway companies have the right to lay tracks in the streets of a city, the one which first, in good faith, begins and diligently prosecutes the construction of its railway, acquires the right of occupancy to the exclusion of others; and where a company acting under a subsequent franchise begins the construction of its road upon the same streets, the former occupant is entitled to an injunction. As to rights of prior occupant where similar franchises are granted to several public service corporations, see Chicago Telephone Co. v. Northwestern Telephone Co., 199 Ill. 324, 8 Am. Electl. Cas. 81, 65 N. E. 329; Northwestern Teleph. Exch. Co. v. Twin City Teleph. Co., 8 Am. Electl. Cas. 103; Louisville Home Teleph. Co. v. Cumberland Teleph. & Teleg. Co., 8 Am. Electl. Cas. 108 (and note on pp. 114-116), 111 Fed. 663.

Where a street railroad company claiming the right to construct its road over a street under a franchise, tears up the tracks and interferes with the operation of the road of another company already operating in the same street, under a prior franchise, the latter company may maintain a suit for an injunction restraining the commission of such acts. Santa Rosa City R. Co. v. Central St. Ry. Co. (Cal.), 38 Pac. 986. But see Ogden City Ry. Co. v. Ogden City, 7 Utah, 207, 26 Pac. 288.

placed in juxtaposition to the rails of the track of defendant in error theretofore laid and constructed in said avenue; that is, the plaintiff in error was to place the east rail of its track along the right of way and roadbed and across and over the ties of defendant in error's road eight inches west of the east rail of said plaintiff in error's track, and to place the west rail of said plaintiff in error's track fourteen inches west of the west rail of said defendant in error's track, and to make excavation under the rails and between the ties on said defendant in error's roadbed for the purpose of constructing its said road by putting its ties therein and its rails thereon. The defendant in error, the Hamilton & Lindenwald Electric Transit Company, brought suit in the Court of Common Pleas of Butler county, Ohio, against the plaintiff in error, the Hamilton, Glendale & Cincinnati Traction Company, to enjoin it from constructing its said road in the manner above described, alleging and claiming in its petition that such construction would be in violation of its (plaintiff's) franchises and vested rights in and to said portion of East avenue then and theretofore used and occupied by it for the purposes of its street railway under grant from the city council of said city of Hamilton, and that such construction would interfere with the operation and maintenance of its said street railroad in, upon, and along said portion of said East avenue, and would destroy its property rights and franchises, and deprive it of its right to use the same, and its rights under its grant from the city of Hamilton. The case was heard in the Common Pleas Court, and was afterward appealed to the Circuit Court of Butler county, Ohio. On the trial in the Circuit Court the following judgment and decree was rendered by that court: "It is, therefore, considered, adjudged, and decreed by the court that the defendant be, and it is hereby, perpetually enjoined from occupying, constructing, laying, or maintaining a street railroad in said East avenue from Grand boulevard to John street under the grant of the 10th day of August, 1901, made by the board of control of the said city of Hamilton, unless the defendant acquires the right by appropriation; and this order is made without prejudice, if the defendant has the right so to do; and it is further ordered that the plaintiff recover its costs herein, taxed at \$——; to all of which the defendant excepts." The plaintiff in error seeks by the present proceeding to obtain a reversal of this judgment and decree of the Circuit Court.

Burch & Johnson and John W. Warring, for plaintiff in error.

Shepherd & Shaffer, for defendant in error.

Opinion by CREW, J.

On the trial of this case in the Circuit Court, the court, on the application of the defendant, the Hamilton, Glendale & Cincinnati Traction Company, made and stated its finding of facts separately from its conclusions of law. It found and stated as its conclusions of fact: "That the plaintiff owns and is operating a

street railroad in the city of Hamilton under grant duly made to it over and along East avenue, in said city of Hamilton, from Grand boulevard to John street and northwardly beyond, and that said street railroad is constructed in, on, and along the center of said East avenue, and that the same has been in operation for more than ten years last past; that the construction of defendant's road by straddling the west rail of the tracks of the plaintiff's road and by placing their ties between and in and upon the roadbed of the said plaintiff's road as now constructed, would be an interference with the franchises and vested rights of said plaintiff company. This finding is without prejudice to the defendant appropriating the rights, if authorized by law so to do." And as its conclusions of law: "The court finds as a conclusion of law that the defendant has no right to interfere with the franchises or vested rights of the Hamilton & Lindenwald Electric Transit Company by placing its tracks as it is proposed and intended to be done, or straddle the tracks of the plaintiff company which now occupies the center of said East avenue from Grand boulevard to John street."

It is conceded in this case by counsel for plaintiff in error that the finding of facts as made by the Circuit Court was not only warranted by the evidence, but that "the facts as found are absolutely true;" but it is claimed and argued by them that the court's deduction therefrom, and its application of the law to the facts so found, is "logically and legally untrue," for the reason, as they insist, that the Hamilton & Lindenwald Electric Transit Company had no private property in its roadbed or right of way, and that it had not, nor could it have, any franchise or vested interest or right in any other than its physical, tangible property, such as its tracks, ties, and other structures placed upon and over its roadbed for the purpose of enabling it to maintain and operate its street railway thereon, and that, inasmuch as no part of said property would be taken or used in the construction of plaintiff in error's railway in the manner proposed, plaintiff in error, under its grant from the board of control of the city of Hamilton of August 10, 1901, has the right to enter upon, occupy, and use the roadbed of defendant in error in the construction and operation of its proposed road without legally appropriating such right, and with-

out making or paying any compensation therefor to said the Hamilton & Lindenwald Electric Transit Company. Whether it may rightfully do this is the question here presented for determination.

The power to regulate and control the public streets and avenues in the municipalities of this State is by statute lodged in the municipal authorities, and under the general statutory powers conferred upon such authorities in each municipality to control the use of the streets within its corporate limits and to prescribe the terms and conditions upon which they may be used and occupied by street railways it cannot be doubted that the local authorities of each municipality may, in the exercise of such power, grant to a street railway company the use of its streets for railway purposes, and may designate and prescribe the particular streets and avenues that shall be subject to such use, and the particular part of each upon which the tracks of such company shall be constructed and laid. By the ordinance of August 4, 1891, the city of Hamilton granted to the Hamilton & Lindenwald Transit Company a certain franchise, whereby said company was authorized to construct its street railway in, over, and upon certain of the streets and avenues of said city of Hamilton, among which was East avenue in said city; and by the terms and conditions of said grant said railway was to be located and constructed as near the center of said East avenue as practicable. This grant was accepted by the Hamilton & Lindenwald Transit Company, and its street railway was constructed in conformity with the terms and conditions of said grant, and, as found by the Circuit Court, for more than ten years said street railway has been, and it still is, operated and maintained by said company over and along said East avenue. Whether, then, any vested or exclusive property rights were acquired by the Hamilton & Lindenwald Transit Company by virtue of said grant and its subsequent possession taken under it in or to that part of East avenue actually occupied and used by it in the construction and operation of its said street railway is the primary and controlling question in this case. That a city council may not, by express grant, give to a street railway company the absolute and exclusive right to occupy and use the streets of the city for street railway purposes, thus creating a monopoly, would seem now in this State to be well settled, and that the city council of the city of Hamilton did not,

by the making of said grant to the Hamilton & Lindenwald Transit Company, exhaust its powers, or deprive itself or its successors of the right, to make additional grants to other street railway companies for like purposes in and to the unoccupied portions of the same street or avenue, would seem to be abundantly sustained by the authorities. But it is, we think, equally well settled that where the right is given by ordinance to a street railway company to occupy and use particular parts of certain streets, and the grant so made is accepted and acted upon by the grantee, the city authorities are thereafter, so long as said grant remains in full force, unforfeited and unrevoked, without right or authority to grant to another street railway company for like use the right to have and occupy without appropriation or the making of compensation therefor to the first grantee, precisely the same ground or right of way first granted. To permit this would be to sanction and allow the impairment of the obligation of an existing contract by subsequent municipal legislation or grant. This may not rightfully be done. *Cooley's Const. Lim.* 383; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 672, 6 Sup. Ct. 252, 29 L. Ed. 516; *City Ry. Co. v. Citizens' R. Co.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114; *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; *Canal Co. v. Railroad Co.*, 4 Gill & J. 1; *The State ex rel., etc. v. Gas Light & Coke Co.*, 18 Ohio St. 262, 292; *The Brooklyn Central R. Co. v. The Brooklyn City R. Co.*, 32 Barb. 358.

While it is undoubtedly true that a street railway company, under a grant authorizing it to occupy and use certain streets for the purpose of constructing, operating, and maintaining thereon its street railway, acquires no fee in the soil upon which its road-bed is constructed and its ties and tracks are laid, it nevertheless does acquire therein a franchise and easement, which becomes and is its private property; and it has the right, during the life of the grant, to the possession and enjoyment of that franchise and easement without interruption or obstruction from any other company, until such time, at least, as it may voluntarily surrender the same, or be legally divested thereof by an authorized appropriation and the payment of full compensation therefor, as required by the Constitution and laws of the State of Ohio. The

right which the grantee acquires by such grant is more than a mere license. It is a vested property right, in the nature of a franchise or easement in and to the particular portion of the street designated in the grant itself; and such grant carries with it the right of exclusive occupancy and user of that portion of the street for the purposes for which it is granted, in so far as such exclusive occupancy and user are consistent with the welfare and convenience of the general public; and where, as in this case, there are conflicting claims asserted by rival companies, each claiming the same location under grant from the city authorities, and for the same character of use, such claims, even were both grants authorized, should be settled and determined by applying the rule that the first of said grantees to rightfully occupy the street has the superior and better claim of right thereto. Judge Elliott, in discussing this question in his valuable work on *Roads and Streets*, at § 750, says:

"If the company which secures the first grant actually occupies the streets it is authorized to use, then there is much reason for affirming that its right to the part of the street actually occupied and used is permanent and exclusive. By actually taking possession of the street and using it for the accommodation of the public, the company first in point of time does such acts as vest its rights."

The rule as thus laid down by Judge Elliott is not in conflict with the spirit and policy of the law which forbids municipal corporations from creating monopolies by favoring one corporation to the exclusion of another. As said by the court in the case of *The Indianapolis Cable St. Ry. Co. v. The Citizens' St. Ry. Co.*, 127 Ind. 388, 24 N. E. 1060, 26 N. E. 893, 8 L. R. A. 539:

"Many things which are lawful are from their nature and of necessity monopolies. * * * As a street railway company has no legal right to lay its track upon the streets of a city without the permission of the common council, if the city should grant such right to one company and refuse to grant it to another the company to which the right was granted would have a monopoly until such time as the common council should grant a similar right to some other person or company. So, if the common council should grant to a street railroad company the right to lay its track on certain streets which were too narrow to admit of being occupied by other street railroad tracks, such company would have a monopoly of such streets. It is plain, therefore,

that while monopolies, as a general rule, are unlawful, there are many exceptions to the rule. The rule applies only to such things as are of common right, and is never to be applied to such things as are in their nature a monopoly."

Again it is said in Elliott on Roads and Streets, § 746:

"To deny the power of the Legislature to make such a grant would lead to the unwarranted conclusion that in no case can the Legislature grant the right to lay or operate a street railroad in a road or street, for, if the power to make such a grant be conceded, it necessarily and unavoidably results that the occupancy of the part of the road or street is exclusive, as two railroads cannot occupy the same space. But it does not follow from this that a monopoly is created, for other parts of the road or street may be granted to competing lines. * * * The effect of a grant to use a designated part of a highway is to license the company first in point of time to occupy and use the designated space, but it does not follow from this that the statute creates a monopoly, since others may occupy other parts of the same highway."

The grant from the city authorities of the city of Hamilton to the Hamilton & Lindenwald Electric Transit Company, being then a valid grant, whatever the nature and extent of the right and interest required thereunder by said company to that particular part of East avenue included in said grant, and subsequently possessed and occupied by said company, it follows that whatever interest it did acquire is its private property, although acquired and held for a public use, and is, therefore, within the protection of the constitutional prohibition "that private property shall not be taken for public uses without just compensation."

It remains, then, only to consider whether the construction of plaintiff in error's railway in the manner proposed, viz., by placing one of the rails of plaintiff in error's track on the road-bed and between the two rails of defendant in error's track, would constitute and be a taking of defendant in error's property, within the constitutional meaning of that term. To constitute a taking of property it is not necessary that there should be an exclusive appropriation, a total assumption of possession, or an absolute and total conversion of the entire property. One of the valuable incidents of absolute property is the right of user, and this right of user necessarily includes the right and power to exclude others from its use. Hence any serious abridgment or interruption of the common and necessary use of property may amount in

law to a taking, and entitle the owner to compensation. "A partial, but substantial, restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. Taking a part is as much forbidden by the Constitution as taking the whole. The difference is only one of degree. The *quantum* of interest may vary, but the principle is the same." Wood's Ry. Law, § 231. In this case the interruption and injury that would necessarily result to the use of defendant in error's property is at once manifest from the nature of the right claimed by plaintiff in error, for it is not susceptible of doubt that the imposition of a portion of plaintiff in error's track upon the roadbed and track of defendant in error would be productive of delay and obstruction to the cars of the latter in the reasonable and necessary operation of its road. Indeed, the obstruction and delay would be precisely the same as if the two companies were running and operating their cars over the same track. Yet plaintiff in error would admittedly be without right to run its cars over the tracks of defendant in error without its consent, or unless it should first have obtained the right so to do by an authorized appropriation.

Upon the facts of this case as found by the Circuit Court we are of opinion that the defendant in error was entitled to the injunction prayed for, and the judgment of the Circuit Court is, therefore, affirmed.

DAVIS, SCHAUCK, and PRICE, JJ., concur.

Other Ohio Cases not Reported in Full.

1. MUNICIPAL ORDINANCE REQUIRING STREET CAR TO BE STOPPED WHEN SIGNALLED.—In the case of *Lockyer v. Covert*, 25 Ohio Cir. Ct. 486, the plaintiff applied for a writ of habeas corpus to secure his release from the custody of the defendant. He was a conductor and was arrested for violation of a city ordinance providing that it shall be unlawful for any person or persons in charge of any electric street car or cars running upon any street or avenue within the limits of said village of Euclid, to fail or refuse to stop such car or cars at any regular stopping place or

places when signaled so to do by persons desiring to board such car or cars, or to alight therefrom. The only question brought up for adjudication was the authority of the municipal council to pass the ordinance.¹ It was held that such council was vested with power to enact such ordinance under a statute (96 Ohio Laws, 21, § 7, par. 9), providing that the council shall have power "to regulate the use of cars, drays, wagons, hackney coaches, omnibuses, automobiles, and every description of carriages kept for hire or livery-stable purposes; and to license and regulate the use of streets by persons who use vehicles, or solicit or transact business thereon; * * * regulate the transportation of articles through such highways, and to prevent injury to such highways from overloaded vehicles, and to regulate the speed of interurban, traction, and street railway cars within the corporation." The last clause in this paragraph empowering the council to regulate the speed of street railway cars does not affect the authority of the council to adopt an ordinance requiring cars to stop at any fixed place or places.

2. **SPECIFIC PERFORMANCE NOT THE PROPER REMEDY TO COMPEL AN ELECTRIC RAILWAY COMPANY TO PERFORM ITS DUTIES TO THE PUBLIC UNDER ITS FRANCHISE.**—In the case of *Matthews v. Southern Ohio Traction Co.*, 25 Ohio Cir. Ct. 652, it was attempted to compel the defendant by specific performance to perform obligations imposed upon it by a franchise authorizing it to construct and operate a street railway. The violation consisted (1) in the conductor's failure to announce the names of the streets; (2) his failure to announce the crossings of other railroads; (3) the failure of the company to keep tickets for sale upon the cars; (4) the operation of its cars at a rate of speed in excess of six miles an hour; (5) failure to operate a sufficient number of cars to accommodate the public. In view of the fact that the failure to announce or stop at crossings or running at an excessive rate of speed are misdemeanors for which a motorman or conductor may be prosecuted and fined, and that the failure by a conductor to supply tickets upon demand relieves the passenger from the payment of fare; and of the further fact that a decree of specific performance would require a personal supervision and control of the defendant's employees, such a decree should not be issued, and the remedy of specific performance is not the proper remedy. The rule in equity is that when in order to make a decree of specific performance effective it would require continuous supervision over the personal conduct of the parties and the exercise of judgment in order to properly meet and adjust relations to new conditions as they might arise in the future, a court of equity cannot and will not extend the remedy.
3. **STREET RAILWAY DOES NOT CONSTITUTE AN ADDITIONAL BURDEN UPON STREET.**—In the case of *Anderson v. Columbus*, 14 Ohio Dec. 180, the

1. As to municipal ordinances, see note to *People v. Detroit United Ry., etc.*, Co., *ante*, p. 460.

court said: "The use of the streets by street railways has always been held in this State to be a proper use of the streets, and within the terms of the original grant for use of the public as a highway, and that such use does not impose an additional burden upon the easement unless the railway be so constructed as to interfere with the owner's easement of access to his property. It is held to be a vehicular use of the streets which must have been fairly within the contemplation of the dedicator. The construction of such railways makes it necessary to construct curves in turning from one street into another, and in constructing such curves it may bring the cars into such close proximity to the projecting corners of sidewalks as to leave an insufficient space for the passage of a vehicle and that is what the evidence shows to be the case at this corner. Nor does it appear that the curve is put in in a manner different from that ordinarily used in constructing such curves. It is true that the radius of the curve is somewhat different from that used upon the opposite corner, but it does not appear that if the radius was changed here that it would make any practical difference in the situation."

4. **STATUTE REQUIRING STREET CAR TO COME TO FULL STOP BEFORE CROSSING STEAM RAILROAD; EMPLOYEE TO ASCERTAIN IF WAY IS CLEAR BEFORE CROSSING RAILROAD.**—In the case of *Kopp v. Baltimore & Ohio South-western Ry. Co.*, 25 Ohio Cir. Ct. 546, it was contended by the defendant that sections 3443-3446 of the Ohio Rev. Stats., providing that before a street car shall cross over a railroad track at grade, such car shall be stopped and an employee of the company shall go ahead and ascertain if the way is clear, relieves the steam railroad company of the duty of so operating its gates as to indicate to the person operating the street car whether the track is clear. It was held that such contention was not sound. The statute was intended to furnish an additional safeguard to the passengers who have no control over the management of the street car. The duties imposed upon both companies are concurrent in point of time, and a failure of either to perform the duty required of it will render it liable for the consequences of such negligence.
5. **FAILURE OF PASSENGER ON ALIGHTING FROM CAR TO LOOK OUT FOR AN APPROACHING CAR UPON A PARALLEL TRACK BEFORE CROSSING IT.**—In the case of *Cleveland Electric Ry. Co. v. Wadsworth*, 25 Ohio Cir. Ct. 376, it was held to be contributory negligence, precluding recovery, for a passenger, upon alighting at night from a street car, to pass around the rear end of the car and attempt to cross a parallel track upon which cars are running in an opposite direction every three minutes, without looking in that direction, or checking his pace, or taking any precaution for his safety, he having knowledge of the surroundings and situation of the tracks, and of the operation of cars thereon. The fact that the employees in charge of the west-bound car which struck the passenger were negligent in running the car at an excessive rate of speed does not authorize a recovery where the plaintiff's negligence contributed to his injury.

- 6. DUTY TO LOOK AND LISTEN BEFORE CROSSING TRACK; DUTY OF ELECTRIC RAILWAYS AT CROSSING.**—In the case of *Day v. Columbus Ry. Co.*, 14 Ohio Dec. 273, it was held that a person in the full enjoyment of his senses of seeing and hearing must make use of them for the purpose of avoiding danger from approaching cars before attempting to pass over a known street railway or steam railroad crossing, and a failure so to do without justifiable excuse will not merely constitute evidence of negligence to be considered by the jury, but will, when established by evidence at the trial, constitute such negligence as will preclude a recovery for personal injuries to which such negligence contributed. The ordinary rules as to the duties imposed upon steam railroads occupying their own right of way in the open country, and at public or private crossings, are not applicable to electric railways occupying one side of a public highway; but the latter have the additional burden of observing ordinary care toward travelers upon the highway, and while they are going to and from their places of habitation over private crossings, and where a collision occurs at such crossing the right to recover for injuries resulting will depend upon whose negligence, as determined by the evidence at the trial, was the proximate cause thereof.

Dubiver v. City & Suburban Railway Co.

(Oregon — Supreme Court.)

- COLLISION WITH VEHICLE CROSSING TRACK; CONTRIBUTORY NEGLIGENCE OF MINOR; INSTRUCTION AS TO DEGREE OF CARE.**—The plaintiff's son, a boy of fifteen years of age, while driving across the tracks of the defendant was injured by being thrown from the vehicle in which he was riding, because of a collision with one of the defendant's cars. An instruction in respect to the contributory negligence of the plaintiff to the effect that the jury were to determine whether he used the care which an ordinarily prudent boy of his age under the circumstances should have used is not objectionable upon the ground that the defendant had no notice that the person in charge of the horse and wagon was a minor. The rule is that in determining the question of contributory negligence the same degree of caution is not required of a minor as in the case of an adult; the degree of care to be used will depend upon the age and capacity of the minor as determined by the particular circumstances of the case. It cannot be said as a matter of law that a minor of the age of fifteen years has arrived at man's estate in judgment, prudence, and forethought.

APPEAL by defendant from judgment in favor of plaintiff. Decided January 11, 1904. Reported 44 Oreg. 227, 74 Pac. 915.

The defendant operates an electric street railway, with double tracks, upon First street, in the city of Portland. David Dubiver, the father and guardian *ad litem* of William Dubiver, a minor, was on November 21, 1902, occupying a store on the southeast corner of First and Jefferson streets, and William was engaged in delivering goods for him about the city with a light, one-horse, goose-neck express wagon, and had been so employed for more than a year. At the date indicated, about 5:30 o'clock in the evening, William drove south on Second street to Jefferson; thence east upon the latter, near the center thereof, to First street, continuing across the first and second tracks of the defendant's railway until the hind wheels of his wagon reached the east rail of the second or east track, when it was struck by a moving car of the defendant company going north, and William was thrown from the seat of the wagon, which he was then occupying, and injured; and this action was instituted to recover damages arising on account of such injuries. William was at the time fifteen years of age. Referring to the bill of exceptions, plaintiff's testimony tended to show that, when William arrived at the west crossing on First street, he stopped his horse, and looked both ways for any approaching car, and, seeing none, drove forward in a slow walk toward the east; that when the wagon had passed over both tracks, except the hind wheels, which had just reached the east rail of the east track, the defendant's car running north at a high rate of speed came in contact with it, and, further, that William took the care and precaution ordinarily used in driving a wagon across the track of an electric railway, and exercised all the usual and ordinary diligence required to cross such a track in safety; that the motorman had no headlight on his car, although it was dusk, and that he failed to ring any gong or to give other warning, or to slow up his car, as it approached the crossing. The defendant's evidence tended to show that, as the car came down First street, it was moving at a high rate of speed; that the motorman in charge saw the express wagon as it was about to cross the tracks at Jefferson street, but at such a distance away that, at the rate it was moving, it would have ample time to clear the tracks before the car reached that street, but at once put the car under control; that after the horse and all the wagon had crossed the tracks, except the hind wheels, which were just at the east rail of the eastern track, and when far enough in front of the car for the wheels to have passed over, and entirely out of reach thereof, the driver suddenly stopped and turned the horse to the right, and that before the car could possibly be checked it came in contact with the wheels of the wagon so situated, and pushed them off the track; and that at the time of the collision the driver had turned the horse and fore wheels of the wagon to the south, so that they stood parallel with the track. It does not appear that the motorman took note of the driver of the wagon prior to the accident — whether he appeared to be a man grown or a youth — and the record is silent upon the subject from his standpoint. The plaintiff having recovered judgment, the defendant appeals.

Rufus Mallory, for appellant.

Alex. Bernstein, for respondent.

Opinion by WOOLVERTON, J.

The trial court, after instructing the jury as to the law relative to contributory negligence, proceeded to say:

"But in the case of children the court cannot say this as a matter of law. In such cases it is more or less a mixed question of law and fact"—and further instructed as follows: "The evidence shows that plaintiff's minor was at the time a minor, somewhere about fifteen years of age. This fact, however, does not excuse him from the obligation to exercise care according to his knowledge and capacity to understand danger, as boys of that age ordinarily are, and to use ordinary care to avoid it; and, if you find from the evidence in this case that plaintiff's minor had sufficient capacity to understand the danger of crossing a railroad track in such a situation, it was his duty to use ordinary care in crossing the track, so as to avoid getting in the way of moving cars; and if he failed to use such care, and because of such failure was injured, he was guilty of contributory negligence, and cannot recover in this action. A child would not be expected to use the same degree of care and prudence that a person of older years and larger discretion would use; but you are to take into consideration the age of the plaintiff's minor, and his character, and all the circumstances and facts—all the evidence throwing light upon the manner in which any injury may have occurred—and then determine whether he used the care which an ordinarily prudent boy of his age, under those circumstances, should have used. If he did use such care, he was not guilty of contributory negligence. If he failed to use such care, then he was guilty of contributory negligence, and the plaintiff cannot recover."

To these instructions, exceptions were taken and reserved, and the sole assignment of error contained in the record is relative thereto. Counsel for appellant insist that the instructions are erroneous (1) because the defendant had no knowledge or notice that the person in charge of the horse and wagon was a minor; that the occupation in which he was engaged was one for an adult, and not for an infant, and the defendant's liability could not in any way be made to depend upon the driver's capacity from considerations of his age; and (2) because the undisputed evidence conclusively shows that the person injured, although a minor, thoroughly understood the situation, the condition of the business in which he was engaged, the risks and hazards attending it, and especially

of crossing the tracks of a street railway upon which were cars propelled by electricity, and, therefore, assumed all the hazards of the position, from which it follows that his infancy was wholly immaterial, and unavailable to limit his liability, or to enlarge that of the defendant.

The first reason advanced as a basis of counsel's position is manifestly without relevancy, under the conditions in which the case comes here. All the instructions pertaining to the negligence of the defendant are admittedly unexceptionable, and no objections were made or exceptions saved thereto in any form, so that the case had passed from the point where plaintiff had the laboring oar. The instructions complained of relate solely to the defense of contributory negligence — a matter devolving upon the defendant to establish — which is entirely distinct, and altogether another phase of the trial procedure. The plaintiff's case had become a closed book, the record unexceptionable. Not so upon the other hand. The defendant was not satisfied with the manner in which its separate and special defense was submitted to the jury; hence its exceptions, and these exceptions raise the sole and only question with which we can deal. In other words, the record shows that plaintiff's case was properly submitted, while the manner in which the defendant's case was submitted is alone questioned, so that the first reason advanced as a basis of counsel's position is without potency now.

The second reason is forceful and cogent, and the problem presented is not a little difficult of solution. The doctrine of the assumption of risks and hazards incident to the occupation in which a person has engaged does not apply otherwise than as between master and servant, but no such relation existed between the defendant and the plaintiff's minor herein. Counsel urge, however, that as the plaintiff's minor presented the same proofs of the exercise of care in crossing defendant's tracks as if he had been of full age, and took the same precautions that an adult would have done, using ordinary care and prudence (that is, by looking both ways as he approached the defendant's tracks, to ascertain if any cars were in sight, and then proceeding across them), and that, as he understood and appreciated the situation and the business in which he was engaged, and all the risks

and hazards pertaining to it, and especially of crossing the tracks of a street railway, therefore the same rule would apply to him as to an adult, and the fact of his infancy was wholly immaterial, and could be of no avail to limit his responsibility. This, it seems to us, does not include the whole case. The very point of dispute centers about the boy driving off the tracks after he had entered upon them. His testimony tended to show that he was proceeding straight ahead in a walk, and at the rate in which he had crossed all the tracks but one, while the defendant's evidence was to the effect that he stopped, or nearly so, with the hind wheels of his wagon upon the east or last track before he had cleared it enough to let the car pass, which action on his part, defendant claims, was the proximate cause of the collision resulting in the injury. Here is involved a question of fact as to what he really did, and it may then be inquired, did he in this particular respect exercise the care and caution that an adult would have used? If he did, and was hurt, the defendant, if negligent, was clearly liable. But it is denied that he did, and asserted that he should have so acted, and this constitutes the very ground for the alleged contributory negligence which would exonerate the defendant. Because the minor exercised the care of an adult in looking before he started to cross the tracks, it does not follow that he exercised, or ought to have exercised, the care of an adult in crossing and clearing the tracks of the defendant. As to his understanding and appreciating all the risks and hazards of the business in which he was engaged, that is a fact in a measure assumed, when compared with the understanding and appreciation of an adult under like circumstances and conditions. The real question involved is whether the court should say, as a matter of law, under the testimony, that the minor was, to all intents and purposes, an adult, and should have been held to like care, foresight, and responsibility. There are cases, properly decided, too, where the courts have said, as a matter of law, that the minor, considered as yet immature, was guilty of such contributory carelessness and negligence that he ought not to recover. Such is the case of *Dietrich v. Balt. & Hall's Springs Ry. Co.*, 58 Md. 347, where a minor attempted to board a moving street car by the front platform, having one of the steps broken

off, when there was a safe way of entry by the rear platform, affording ready and easy access. In this case Mr. Justice Alvey, in his opinion, says:

"Now, conceding that there was negligence on the part of the defendant in running the car with a broken or an insufficient step to the front platform, and that there was fault in the driver in not stopping the car upon the approach of the plaintiff, the question is, did the plaintiff so directly contribute to the happening of the accident by his own want of ordinary and reasonable care as to preclude the right of recovery for the injury suffered? This is not a question that arises upon conflicting evidence, or where inferences might be drawn from the proof of indirect circumstances, in which cases the question would be exclusively for the jury. * * * His want of caution, and his reckless disregard of the danger in attempting to board the car while in motion, would clearly appear to have been the direct cause of the accident. He was old enough to know and understand the risk that he incurred, and, if he had used his eyes, he could not have failed to perceive that the step had been broken from the platform. Under such circumstances, neither he nor his father can have any right of action against the defendant."

Another case grounded upon the same principle is *Thompson v. Buffalo Ry. Co.* (N. Y.), 39 N. E. 709. The plaintiff's minor was a girl of fourteen years, and the court, in rendering its opinion, says:

"Although a minor, no claim is made that Alcy was not *sui juris*. While she may not have possessed the judgment, caution, and prudence of persons of more mature years, she was expected and required to exercise the measure of care and caution that is common and usual in one of her age."

But the case was taken from the jury on a motion for nonsuit. Another case that has come under our observation is *Nagle v. Allegheny Valley R. Co.*, 88 Pa. St. 35, 32 Am. Rep. 413. Here the case was taken from the jury by invoking the presumption that a child of fourteen years had sufficient capacity to be sensible of danger and to have the power to avoid it, which presumption, it was said, would stand until overthrown by clear proof of the absence of such discretion as is usual with infants of that age. This case, although the opinion was rendered by Mr. Justice Paxson, a jurist of eminence and ability, does not seem to have been followed subsequently in the same State or elsewhere, so far as our research has extended. The doctrine of the two cases preceding the last cited was invoked in *Cooper v. Lake Shore*,

etc., Ry. Co., 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482, but the court refused to apply it; saying, in effect, that many cases are cited in which children have been held accountable for contributory negligence, but that the case under consideration was not one of them, the evidence being conflicting upon the very point in dispute. But a case of distinct analogy to the one at bar is *Wright, Administrator v. Detroit, etc., Ry. Co.*, 77 Mich. 123, 43 N. W. 765. There the plaintiff's intestate, a boy under fifteen years, while riding on a sleigh driven by another boy of the same age, was struck by defendant's train and killed. There was a conflict in the testimony relative to the defendant's negligence, and that part of the case was, as here, properly submitted to the jury. The trial court, as was shown by its charge, held the boy who was killed to the same degree of diligence in his efforts to avoid the accident which overtook him as would be required of an adult, and the exception in the Supreme Court was directed to this holding; but, in deciding the case, the Supreme Court, speaking through Mr. Chief Justice Sherwood, says:

"The rule is this: 'That the care and discretion to be used by children, and for which they must be held chargeable, must be proportioned to their age and capacity; and, while it must be ordinary care, it is not the ordinary care required of an adult under the same circumstances.'" And after alluding to some of the authorities, the learned chief justice continues: "I think the law may be regarded as well settled in this State that, in determining the question of contributory negligence, not the same degree of caution is required of an infant as in the case of an adult, and, when such negligence is sought to be charged against a lad of less than fifteen years of age, the rule clearly applies; and the charge of the court is erroneously defective, which fails to state the rule, and challenge the attention of the jury to it, in applying the law to the facts and circumstances such as are disclosed by the evidence in this case."

There was a dissenting opinion by Mr. Justice Campbell, in which he says:

"There are, no doubt, cases where peculiar knowledge is an element to be considered, aside from ordinary sense and ordinary experience, and where the lack of such knowledge is more likely to exist in minors or youths than in persons of experience, but the particular risk in this case was one which would be as palpable to a boy of fifteen as to a man. A much younger boy would comprehend the danger of slowly crossing a railroad when a train is approaching or likely to approach."

This, however, concedes the rule as announced in the main opinion, but denies its application in that case. Mr. Justice Hunt, in *Railroad Co. v. Gladmon*, 15 Wall. 401, 408, 21 L. Ed. 114, says:

"Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than of one of seven, and of a child of even less than of one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case."

The rule was subsequently applied by the same eminent jurist in the turntable case of *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745. This court has spoken to the same effect in *Cassida v. O. R. & N. Co.*, 14 Oreg. 551, 13 Pac. 438, and *Schleiger v. Northern Ter. Co.* (Oreg.), 72 Pac. 324. So in *Haycroft v. Lake Shore, etc., R. Co.*, 2 Hun, 489, where the party injured was a girl of sixteen years, the court said with reference to the controversy:

"Now, if there is any allowance to be made, in measuring the degree of care which this young girl was bound to use, for her youth, her inexperience, for the tendency of persons of her age to allow their attention to be given to objects of interest in their immediate view, and to overlook dangers from causes not immediately in view, then it was for the jury to say whether this young girl did not, under all the circumstances, use all the care and diligence to guard against danger that could be reasonably required from one of her age."

The trial court took the case from the jury, but it was reversed upon that account; the Fourth Department of the General Term of the Supreme Court, in passing upon the case, using the language above quoted. This case was affirmed on appeal to the Court of Appeals. See s. c., 64 N. Y. 636. So, also, in the case of *Daniels v. Clegg*, 28 Mich. 32, which was that the trial court was correct in charging that "the jury should consider the age of the daughter [she being the person injured, and about the age of twenty years], and the fact that she was a woman," and "that she would not be guilty of negligence if she used that degree of care that a person of her age and sex would ordinarily use." The principle is of unquestioned soundness, and

has been applied in many cases. See *Cooper v. Lake Shore, etc., Ry. Co., supra*; *East Saginaw City Ry. Co. v. Bohn*, 27 Mich. 503; *Quill v. Southern Pacific R. Co.* (Cal.), 73 Pac. 991; *Hasenyer v. Michigan Cent. R. Co.*, 48 Mich. 205, 12 N. W. 155, 42 Am. Rep. 470; *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645; *Traction Co. v. Scott*, 58 N. J. L. 682, 34 Atl. 1094, 33 L. R. A. 122, 55 Am. St. Rep. 620; *Kerr v. Forgue*, 54 Ill. 482, 5 Am. Rep. 146; *Bridger v. Railroad Co.*, 25 S. C. 24; *Kline v. Central Pacific R. Co.*, 37 Cal. 400, 99 Am. Dec. 282; *McGuire v. Chicago, M. & St. P. Ry. Co.* (C. C.), 37 Fed. 54.

In the case at bar the instruction incorporating the principle was proper, unless the minor had arrived at man's estate in judgment, prudence, and forethought; and, in order to declare that it was improper, we should be able to say, as a matter of law, that such was the case. This we are impressed we cannot do. Just at what period in a child's advancement in years he is to be considered to have arrived at maturity, and to have assumed all the responsibilities of a man, as distinguished from a child, is an indeterminate quantity. But if, as in the case of *Wright, Administrator v. Detroit, etc., Ry. Co., supra*, the instruction was proper where the child was just under fifteen, and in *Haycroft v. Lake Shore, etc., R. Co., supra*, where the girl was sixteen, and in *Daniels v. Clegg, supra*, where she was twenty, there can be no reason for believing that it was improper in this case. It could not be so, as the comparative ages will not warrant it. Whether a boy of the capacity of the plaintiff's minor was able to apprehend the danger involved, and had sufficient sagacity to avoid it successfully, and yet, notwithstanding his minority, he was negligent, is a question that would properly arise upon a motion for nonsuit; but it could not be insisted on in this case, as the bill of exceptions shows there was a conflict in the testimony relative to whether he was negligent in that respect or not.

The judgment of the trial court will be affirmed, and it is so ordered.

Holt v. Pennsylvania Railroad Co.

(Pennsylvania — Supreme Court.)

STEAM RAILROAD OPERATED IN STREET; COLLISION WITH VEHICLE ON TRACK; DUTY OF RAILROAD COMPANY.— Where a steam railroad company operates its railroad in a street its trains must be run with due regard to the safety of persons rightfully using the street.¹ The mere fact that a person drives upon the track so laid in a street does not constitute him a trespasser, nor does he thus forfeit his right to exact from the railroad company a reasonable effort to avoid a collision. Whether or not they did so is a question of fact to be determined by the jury.

APPEAL by plaintiff from an order refusing to set aside a nonsuit. Decided May 25, 1903. Reported 206 Pa. St. 356, 55 Atl. 1055.

William G. Keir, for appellant.

John Hampton Barnes and *George Tucker Bispham*, for appellee.

Opinion by POTTER, J.

It appears from the evidence in this case that, upon a portion of Richmond street in Philadelphia, two tracks for a street railway and one track for a steam railroad are laid. The street railway tracks are in the center, and the railroad track is at one side. All the tracks are so laid with respect to the paving as

1. As to the operation of steam railroads in streets and highways, see *Bork v. United N. J. R. & C. Co.*, *ante*, p. 727.

Person on track of steam railroad in street.— A person who walks upon the track of a steam railroad which is laid in a public street is not a trespasser. *Louisville, etc., R. Co. v. Hairston*, 97 Ala. 351, 12 So. 299; *Louisville, etc., Ry. Co. v. Philips*, 112 Ind. 59, 13 N. E. 132, 2 Am. St. Rep. 155; *Kansas Pac. Ry. Co. v. Pointer*, 9 Kan. 620; *Fehnrich v. Michigan Cent. R. Co.*, 87 Mich. 606, 49 N. W. 890; *Gulf, etc., Ry. Co. v. Walker*, 70 Tex. 126, 7 S. W. 831, 8 Am. St. Rep. 582. A person walking upon tracks so located is entitled to protection from the negligence of the company, and is not subjected to the rule applicable to a trespasser upon railroad tracks that the company owes to him no duty except to avoid injuring him, if possible, after his presence is discovered. *Pittsburgh, etc., Ry. Co. v. Bennett*, 9 Ind. App. 92, 35 N. E. 1033; *Gulf, etc., Ry. Co. v. Walker*, 70 Tex. 126, 7 S. W. 831, 8 Am. St. Rep. 582.

not to impede the use of the street by vehicles and the general public. The railroad track is used for the movement of freight trains only. The plaintiff was familiar with the locality, having driven over it frequently. Upon the afternoon of January 9, 1901, he was driving a horse and wagon loaded with iron, going north upon the easterly track of the trolley road. When near Huntingdon street a trolley car behind him rang its bell for him to clear its track. A south-bound trolley car was approaching him upon the other trolley track, and several wagons were in the space between the trolley tracks and the west side of the street. He, therefore, turned to the right, and over upon that portion of the street where the railroad track of the defendant company was laid. He continued to drive along the street, with one wheel of his wagon between the rails of the railroad track, until the trolley cars behind him had passed. In this way he consumed about four minutes of time, and traveled about 120 feet. He was beginning to turn again to the left, in order to get back into the trolley track, as the way was then open for him to do, when his wagon was struck in the rear by a locomotive engine of the defendant company. The shock was not very severe, but it was sufficient to drive an iron shaft which lay in the wagon with considerable force against the plaintiff's back. To recover for resulting injuries, this action was brought.

Upon the trial, the learned judge of the court below was of the opinion that the plaintiff was guilty of contributory negligence in driving upon the part of the street where the railroad track was laid, and in continuing there until his wagon was struck in the rear by the approaching engine. He, therefore, entered judgment of compulsory nonsuit, and his subsequent refusal to take it off is here assigned as error. This is not a case of one turning into the track in front of an approaching train, and being immediately struck. If it were, the court below would unquestionably have been right in pronouncing it contributory negligence. The plaintiff was occupying the portion of the street included between the rails for several moments before the accident, and was driving slowly along, and was in the act of turning back into the trolley track when his wagon was struck by the engine. The case was tried in the court below, evidently, upon the theory that the rights of the defendant to the use of the railroad track

at the place of the accident were precisely the same as, and no less, than they are where laid upon its own right of way, purchased or condemned by it, and appropriated to its exclusive use. If the place in question was the exclusive roadway of the company, in which the public had no right of passage, then the defendant would not be liable to one who drove upon it, unless the injury were willfully or intentionally inflicted. But if it was a street which the public had a right to use, then, even if it were occupied in part by the track of the railroad, no one driving upon it, and making such use of the street as it is ordinarily and manifestly intended for, could be considered as a trespasser. It is true that such a one might be guilty of contributory negligence in the manner in which he made use of the street and drove upon the track, but he could not, from the mere fact of being upon the track as laid in the street, be considered a trespasser, and held to forfeit his right to exact from the railroad company a reasonable degree of care in the running of its trains.

In the present case it is admitted that the accident occurred upon a public street, and nothing appears in the evidence to show that the defendant company had anything more than a right to lay down a railroad track therein, and run cars thereon. The track was not raised above the level of the street, but was laid in the same manner as the street car tracks, and was paved in with Belgian blocks. All this indicated that the street retained its character as a public highway for the use of all kinds of vehicles. Under these circumstances, it could not be considered negligence, in itself, for a citizen to drive over or along the track.

At this particular point the street was occupied with two tracks of a street railway, and one track of a steam railroad, and it is not apparent that the rights of the latter to the use of the street differed in any degree from those of the street railway. In fact, the argument of the appellee is in part directed to the application to this case of the decisions in street railway cases upon contributory negligence. And if the facts justified their application here, such authorities would certainly be appropriate and controlling. But in none of the cases cited do we find sufficient similarity in the facts to those now under consideration to make them available to sustain the action of the court below. In *Winter v. Federal St., etc., Pass. Ry. Co.*, 153 Pa. St. 26, 25

Atl. 1028, 19 L. R. A. 232, the doctrine was carried to the extreme, but there the plaintiff turned his wagon squarely across the track, and left it there while he was unloading, and depended upon the defendant company to avoid a collision by stopping its car in time while approaching upon a down grade. In *Gilmore v. Federal St., etc., Pass. Ry. Co.*, 153 Pa. St. 31, 25 Atl. 651, 34 Am. St. Rep. 682, there was like gross negligence upon the part of the plaintiff. The cases of *Gilmartin v. Lackawanna Valley Transit Co.*, 186 Pa. St. 193, 40 Atl. 322, and *Penman v. McKeesport, etc., Ry. Co.*, 201 Pa. St. 247, 50 Atl. 973, were those in which the plaintiffs were struck while walking at night longitudinally on the tracks. There is a manifest difference in the rule which should properly be applied to pedestrians who make an unfitting use of the streetway in converting it into a footway, and that which is appropriate to drivers of teams, who have a right to use, with due care, any portion of a public driveway. Each has its appropriate purpose—the street for the use of the horse and vehicle; the sidewalk, for the pedestrian. When either is found in the place set apart for the other, it is manifestly out of the ordinary. In the present case the plaintiff was making a proper and legitimate use of the street. The conditions under which the railroad company laid and used its tracks at that point made it incumbent upon it to operate its trains with due regard to the safety of other people who were also rightfully using the street, at the same time.

The testimony shows that, when it became necessary for the plaintiff to turn out of the trolley track and to pass over to the railroad track, he did not drive immediately in front of the approaching train. On the contrary, he drove steadily along the street for a distance of perhaps 140 feet; occupying, as was estimated, about four minutes of time before his wagon was reached and struck by the engine. The latter in the same time had run only about 340 feet, so that it is difficult to see why the engine, running so very slowly, might not have been stopped before striking the wagon of the plaintiff. However, that was a matter of defense, which might have been satisfactorily explained to the jury. But it was for them, rather than for the court. If the plaintiff was lawfully using the track in front of the approaching train, while it was his duty to give way to it and not obstruct its progress,

yet he was entitled to reasonable warning and reasonable time to get out of the way. The employees of the railroad were bound to keep the train under proper control, and they had no right to run into plaintiff, either upon the track, or while in the act of leaving it. They were bound to use every reasonable effort to avoid a collision. Whether or not they did so, was a question of fact; and this, as well as the question of any contributory negligence upon the part of the plaintiff, should, under proper instructions, have been left to the jury. It was certainly not so clear as to justify the court in pronouncing upon it as a matter of law.

The assignments of error are sustained, and the judgment is reversed, and a *venire facias de novo* is awarded.

Shamokin Borough v. Shamokin & Mt. Carmel Electric Railway Co.

(Pennsylvania — Supreme Court.)

CONTRACT REQUIRING STREET TO BE PAVED.—An ordinance authorizing the construction of a single-track railway with necessary sidings on certain streets required the company to pave the parts of the streets on which its tracks were laid, and to pave the whole width of the streets from curb to curb where sidings were laid. At the time the railway was constructed the pavement had not yet been laid. The company notified the borough of its intention to remove its sidings from a certain street as soon as the frost was out of the ground. Subsequent to the notice an ordinance authorizing the paving of the street was approved. It was held that the company was not required to pave the entire width of the street at the place from which the siding was removed.

As to duty of railway company to pave between tracks under a contract with a municipality providing therefor, see *Farson v. Fogg*, 2 St. Ry. Rep. 87, (Ill.) 68 N. E. 755. As to street pavement assessments, see *City of Lincoln v. Lincoln St. Ry. Co.*, 2 St. Ry. Rep. 634, (Nebr.) 97 N. W. 255. As to municipal regulation requiring street railway company to pave between and outside rails, see *Binninger v. City of New York*, 2 St. Ry. Rep. 738, 177 N. Y. 199, 69 N. E. 390. As to effect of franchise providing for the repaving of streets between tracks by city, see *City of Detroit v. Detroit United Ry. Co.*, 1 St. Ry. Rep. 368, (Mich.) 95 N. W. 736. As to liability of street railway company to repave between its tracks, see *City of Williamsport v. Williamsport Pass. Ry. Co.*, 1 St. Ry. Rep. 689, (Pa.) 55 Atl. 836.

APPEAL by defendant from judgment for plaintiff. Decided July 9, 1903.
Reported 206 Pa. St. 625, 56 Atl. 64.

S. P. Wolverton and S. P. Wolverton, Jr., for appellant.

W. H. M. Oram and W. H. Unger, for appellee.

Opinion by FELL, J.

The defendant company was authorized by ordinance of March 2, 1893, to construct a single-track railway with necessary sidings on certain streets in the borough of Shamokin. In pursuance of this ordinance it laid a single track on one side of Sunbury street, and a siding 400 feet long on the other side. The intention of the company was to use this siding in connection with a branch road, which was never built, and the siding was not used except occasionally for the storage of cars. The road was constructed in advance of street improvements, and the ordinance imposed on the company the duty to pave the parts of the streets on which its tracks were laid, and to pave the whole width of the streets, from curb to curb where sidings were laid, when the borough should pave the other parts of the streets. It was further provided by the ordinance that, if the company failed after notice to pave the streets, the work might be done by the borough, and the cost thereof, with a penalty of 20 per cent., might be recovered from the company. This action was to recover the cost of paving the whole of that part of Sunbury street where the siding had been placed. The company admitted its liability for the cost of paving the part of the street on which its track was laid, but denied the right of the borough to recover the whole cost of the pavement, on the ground that it had given notice to the borough of its intention to remove the siding before the ordinance authorizing the paving was approved. A verdict was directed for the plaintiff for the whole cost.

The facts were not in dispute. In June, 1898, the company requested the borough to consent to the removal of the siding, and to the placing of its main track on the center line of the street, or, if this was thought objectionable, to consent to the removal of a part of the siding. Notice was given at the same time that, if both requests were refused, the company would

remove the siding. This request was peremptorily refused by the borough in August of the same year. In November, 1898, the council was asked to appoint a committee to confer with a committee of the company on this subject. This request was refused. Later in the same year a committee of the company appeared before the council in regard to taking up the siding. The council refused its consent, and declined to accede to any proposition presented. An ordinance to authorize the paving of the street was presented to the council on January 3, 1899, passed third reading on February 7th, and was approved by the burgess on February 20th. On February 13th a written notice was given by the company to the burgess and council that it had determined to remove the siding, which was unnecessary for its operations, and a needless incumbrance on the street, and that it proposed to remove the same as soon as the frost was out of the ground, and in any event would remove it before the grading and paving should begin. The borough invited bids for the work on April 20th, and entered into a contract with a paving company for the paving of the street on May 31, 1899. Soon afterward the company began to remove the siding, when it was enjoined on the application of the borough. The preliminary injunction was dissolved on September 12, 1899, and the siding was then taken up. The right of the company to remove was finally determined on appeal to this court on May 23, 1900. See *Shamokin Borough v. Shamokin, etc., Electric Ry. Co.*, 196 Pa. St. 166, 46 Atl. 382.

The learned trial judge states in his charge that there was nothing in the testimony that indicated that the notice of an intention to remove the siding was not given in good faith and for the reason that the siding was unnecessary for the operation of the railway, and that the delay in removing it until the work of excavation for the paving had begun was a prudent measure, because it served the public convenience by avoiding the tearing up of the street twice, as well as the company's interest, since it could more easily be removed at that time. He concluded, however, that the notice of February 13, 1899, was too late to relieve the company of its liability to pay for the paving from curb to curb of that part of the street on which the siding was located. This conclusion would be warranted if the borough had paved in reliance on the conduct of the company. But it did not. The

council relied on the belief that, as matter of law, it could prevent the removal of the siding, and thus for all time place the cost of street improvements on the company. In this it was mistaken. It had notice nearly two years before of the company's intention to remove the siding, and had distinct notice before the approval of the ordinance, and three months before it incurred any liability, of the company's determination to remove it as soon as the frost was out of the ground. It may be assumed that the purpose of the company in removing a useless siding was to free itself from the cost of paving in the future. It is certainly clear that the purpose of the council was to keep the siding in place until the time of paving arrived. Each party stood in its supposed legal right, one seeking to avoid and the other to impose the cost of a future street improvement. The company's liability to pave the full width of the street was conditional only. It related to the parts of the streets on which sidings were laid, and arose only when the borough should pave the rest of the street. The fact that a siding had once been placed on the street would not make the company liable forever. If it became necessary to relocate the siding, the company would be liable for the paving of the new location and relieved as to the old one. If, as in this case, it was found unnecessary, its removal would relieve the company from all liability. The obligation was, in effect, to pave the full width where sidings were maintained.

It was admitted at the trial that the company was liable for the cost of paving the part of the street occupied by its single track, and that this amount with interest to the trial was \$1,220.21. Since an order reversing the judgment with a new venire would cause the delay and expense of another trial to recover an amount admitted to be due, we now direct that the judgment appealed from be reduced from \$4,149 to \$1,220.20, with interest from the date of the verdict. With this modification the judgment is affirmed.

Goodman v. Coal Township and Shamokin & Mt. Carmel Electric Railway Co.

(Pennsylvania — Supreme Court.)

INJURIES CAUSED BY DEFECTIVE HIGHWAY; JOINT LIABILITY.— The plaintiff's wife was killed by being thrown from a buggy overturned while crossing the tracks of the defendant railway company, because of the alleged defective condition of such tracks. It was sought by the plaintiff to charge the town with negligence because of its failure to perform its duty to keep the highway in repair and in a condition safe for public travel, and also to charge the railway company with negligence for constructing its tracks across the public highway in a negligent and unsafe manner, thus creating a dangerous impediment and obstruction to public travel. It was held that the negligence of the town in failing to repair the highway and the negligence of the company in defectively constructing its tracks were not joint, there being an entire absence of evidence as to any concert of action between the street railway company and the township.

APPEAL by defendants from a verdict in favor of plaintiff. Decided July 9, 1903. Reported 206 Pa. St. 621, 56 Atl. 65.

S. P. Wolverton and *W. W. Ryon*, for appellants.

James Scarlet, *W. H. M. Oram*, *J. H. McDevitt*, *J. E. Bastress*, and *L. S. Walter*, for appellees.

Opinion by **POTTER, J.**

Three suits in trespass were brought against the township of Coal, Northumberland county, and the Shamokin & Mt. Carmel Electric Railway Company by Isaac Goodman, Andrew Belter, and August Czinski and wife, respectively, the first two to recover damages for the death of plaintiffs' wives and the last for injuries sustained by Mrs. Czinski, one of the plaintiffs. In their statements of claim the plaintiffs all declared against the two defendants as joint trespassers. The three cases, having arisen from the same state of facts, were tried together, and resulted in verdicts for the plaintiffs in each case. This opinion is, therefore, intended to apply to each case.

On the evening of October 15, 1899, about dusk, the three women were driving in a buggy on the public road leading

from Shamokin to Mt. Carmel and within Coal township. This road is crossed by the tracks of the Shamokin & Mt. Carmel Electric Railway Company. As the buggy containing the women was crossing the tracks of the railway company, it was overturned, and its occupants were thrown out into the ditch at the side of the road. Mrs. Goodman was instantly killed, Mrs. Belter was injured so seriously that her death ensued in a few days, and Mrs. Czinski suffered severe and permanent injuries. The plaintiffs alleged that the railroad tracks, either from the negligent manner of their construction or from the failure to keep them in proper repair, were dangerous to persons driving across them, and that this unsafe condition of the tracks was the cause of the accident.

In their statements the plaintiffs sought to charge the township with negligence because it had failed in its duty to keep the highway in good order and repair and in a condition safe for public travel, and also to charge the railway company with negligence for constructing its tracks across the public highway in a negligent and unsafe manner, thus creating a dangerous impediment and obstruction to public travel. They also charged the township with negligence in permitting the railway company to obstruct the highway and render it unsafe for travel. The statements all concluded with averments that, by reason of the joint carelessness and negligence of the defendants, "the said township of Coal in not keeping the said public road in good condition and repair and safe for public travel, and in allowing the said obstruction, depression, defects, and imperfections to remain therein after due notice thereof, and the said Shamokin & Mt. Carmel Electric Railway Company in erecting, constructing, and placing said obstructions, depressions, and imperfections in said road and keeping and maintaining the same therein, so as to render and keep the said public road dangerous and unsafe for public travel," the plaintiffs had sustained their injuries.

The court below declined to give binding instructions for the defendants, and permitted the jury to find verdicts against them both as joint tort feorsors. As to that aspect, these cases cannot be distinguished in principle from *Dutton v. Lansdowne Borough*, 198 Pa. St. 563, 48 Atl. 494, 53 L. R. A. 469, 82 Am. St. Rep. 814; *Wiest v. Electric Traction Co.*, 200 Pa. St. 148, 49

Atl. 891, 58 L. R. A. 666, and *Rowland v. Philadelphia*, 202 Pa. St. 50, 51 Atl. 589. In *Wiest v. Traction Company*, it was said (page 152, 200 Pa. St., and page 892, 49 Atl.): "If no concert of action is shown, and, therefore, no joint tort, and the case is one of separate tort or torts upon the part of one or of several defendants, the action is not sustained, and there should be no verdict against any one. In a suit for a joint tort there should be no recovery upon proof of one or more separate torts. When a joint tort is charged, a joint tort must be proved, in order to sustain the action. The allegation and the proof must agree in cases of tort, as in other cases."

This case is emphasized as stating the correct rule in the late case of *Minnich v. Lancaster, etc., Electric Ry. Co.*, 203 Pa. St. 632, 53 Atl. 501.

There can be no doubt under the above authorities that the torts here complained of were separate, not joint. Neither under the facts as set forth in the plaintiffs' statement, nor as shown upon the trial, was there any concert of action apparent between the township and the railway company. Upon the record as it stood at the time of the trial, and upon the plaintiffs' evidence, no verdict could have been properly rendered against any one, and the defendants were entitled to binding instructions in their favor. But as pointed out in *Rowland v. Philadelphia*, 202 Pa. St. 50, 51 Atl. 589, and *Minnich v. Lancaster, etc., Electric Ry. Co.*, 203 Pa. St. 632, 53 Atl. 501, the plaintiffs would have had the right, if the question of joint liability of the defendants had been directly raised upon the trial, to amend the statement and proceed against either one of the parties who may have been liable under the proofs adduced, and subject to the defendants' right to a continuance.

While the judgment must be reversed, it is proper that a new venire should be granted, in order that the plaintiffs may now elect which of the defendants to follow, and that the statement may be amended accordingly.

The judgment in each case is reversed, and a *venire facias de novo* is awarded.

Palmer v. Warren Street Railway Co.

(Pennsylvania — Supreme Court.)

1. INJURY TO PASSENGER CAUSED BY COLLISION; PRESUMPTION OF NEGLIGENCE.— Where a passenger on a street car is injured by collision with a car approaching down a grade from the opposite direction, caused by the breaking of a brake chain on the car that ran into the car on which the passenger was riding, there is a legal presumption of negligence casting upon the street railway company the burden of rebutting it. The presumption arises, notwithstanding the fact that the defect was not in the car upon which the passenger was riding.¹

1. Presumption of negligence where passenger is injured by collision.— As to application of doctrine of *res ipsa loquitur* to injuries to passenger, see note to *Chicago City Ry. Co. v. Carroll*, 2 St. Ry. Rep. 126, (Ill.) 68 N. E. 1087. As to presumption of negligence where passenger is injured by derailment of car, see *Heyde v. St. Louis Trans. Co.*, 2 St. Ry. Rep. 630, (Mo. App.) 77 S. W. 127; *Smith v. Milwaukee Elec. Ry. Co.*, 2 St. Ry. Rep. 962, 96 N. W. 823, and note on page 963.

A street railway company is liable for injuries to a passenger, who was without contributory negligence, from a collision due to negligence, however slight, on the part of its employees, or which by the exercise of ordinary human foresight could have been avoided. *Nellis Street Railroad Accident Law*, 166, citing *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334, 42 Pac. 860. The case of *Wynn v. Central Park, etc., R. Co.*, 133 N. Y. 575, 30 N. E. 720, was somewhat similar to the principal case. It there appeared that a passenger was injured on a street car which collided with another car while going down a grade, in consequence of the brake chains parting, and the evidence showed that after the chain broke the driver did all that he could to stop the car, remained upon it until it was within four feet of the front car, and it did not appear that the driver was incompetent or did not use proper care; it was held that, while he might have used unnecessary force in applying the brake, the evidence of negligence was not sufficient to go to the jury.

It has been held, however, that the presumption of negligence toward a passenger may be drawn from proof of the breaking down of some of the means of transportation employed by a street railway company. *Choquette v. Southern Elec. R. Co.*, 80 Mo. App. 515. And where a street car collided with a wagon in a public street it was held proper, in an action for injuries to a passenger caused thereby, to refuse to instruct that the plaintiff must establish negligence by a preponderance of evidence, since, under the doctrine of *res ipsa loquitur*, proof of a collision raised a presumption of negligence on the part of the defendant requiring it to establish that the motorman was not in fact negligent. *Shay v. Camden & S. Ry. Co.*, 66 N. J. L. 334, 49 Atl. 547.

2. **INJURIES RECEIVED BY JUMPING FROM CAR.**—A well-grounded fear that a collision is about to take place which will result in serious or even fatal injury to a passenger is a justification for jumping from the car; and the presumption of the railway company's negligence is not confined to the case of injuries resulting from actual collision, but extends to those caused by an effort to escape it, when made on a well-grounded belief that it will occur.²
3. **DEGREE OF CARE TO BE EXERCISED FOR PROTECTION OF PASSENGERS.**—More than mere reasonable precaution against injuries to passengers is required. While the law does not require the utmost degree of care which the human mind is capable of imagining, it does require that the highest degree of practical care and diligence shall be observed that is consistent with the mode of transportation adopted; and the sufficiency of cars and appliances is to be measured by those which have been proved by experience to be the most efficacious in known use in the same business.
4. **CARS COMING AND GOING ON SAME TRACK.**—The fact that there was a car coming and going on the same track did not itself show negligence on the part of the street car company.

APPEAL by plaintiff from a verdict for defendant. Decided July 9, 1903.
Reported 206 Pa. St. 574, 56 Atl. 49.

When Dr. Stewart was on the stand he was asked this question: "Q. What would you say as to the permanency of that injury? A. Yes, sir. Q. Of the curvature of the spine? A. I should think it would be permanent. Q. How,

Where a passenger in an open horse car was injured in a collision with the cable car of another company whose line crossed the horse-car line at right angles, it was held that the fact of the accident raises a presumption, under the doctrine of *res ipsa loquitur*, that the carrier of the passenger was negligent, for it was bound to exercise a very high degree of care, especially at an intersection with another road. *Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380, 56 N. E. 988. But in case of such an accident where the action is brought against both companies, it would be error to charge that the mere happening of the accident raised a presumption of negligence upon the part of each of the defendants which it was incumbent upon them to rebut. *Falke v. Third Ave. R. Co.*, 38 App. Div. (N. Y.) 49, 55 N. Y. Supp. 984. See also, in this connection, *Gilmour v. Brooklyn Hts. R. Co.*, 6 App. Div. (N. Y.) 117, 39 N. Y. Supp. 417; *Klinger v. United Tract. Co.*, ante, p. 799; *Sharpe v. Kansas City Cable R. Co.*, 114 Mo. 94, 20 S. W. 93; *Smith v. St. Paul City R. Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; *Madara v. Shamokin, etc., Elec. R. Co.*, 192 Pa. St. 542, 43 Atl. 995.

2. **Jumping from car to avoid accident.**—The rule in this connection is well stated by Judge McClain in his article on "Carriers," 6 Cyc. 637, where he says: "In determining whether the passenger has exercised ordinary care to avoid the injury which he has received as a result of the carrier's negligence, it sometimes becomes a question whether he has been negligent

if at all, would that affect her ability to perform labor? (Objected to as incompetent and irrelevant. Objection sustained, and exception sealed for plaintiff.)" Plaintiff presented the following point: "If the jury find from the evidence that the plaintiff, Kate Palmer, was a passenger on the car of the defendant corporation, and that when said car was ascending quite a heavy grade another car was suddenly discovered coming down the grade on the same track and toward the car on which the said plaintiff was a passenger, and that the electric current of the car upon which plaintiff was riding was reversed, and said car was started back down the grade, and the other car kept gaining upon it, and a collision seemed certain, and the plaintiff, Kate Palmer, believed herself in imminent danger of being killed or seriously injured, and was in the act of jumping from said car to the ground, and either actually jumped, or when in the act of jumping was thrown from said car to the ground and was injured, and that immediately after she struck the ground said cars did actually collide, the presumption of law is that the defendant was negligent. Ans. We cannot answer this point in the affirmative as it is drawn." Defendant presented these points: "(3) The burden of proof in this case is upon the plaintiffs to establish the negligence of the defendant. Ans. This is affirmed." "(5) If the jury believe that the defendant in this case adopted all reasonable precaution against the injuries of its passengers, and that its cars and appliance were proper for its business in known general use, and that the reason for not immediately stopping the car approaching the one on which the plaintiff, Mrs. Palmer, was riding, was on account of unforeseen and unaccountable breaking of the brake

in doing an act which would in itself have been presumptively negligent, but under circumstances which it is claimed justified him in the attempt to escape a threatened injury, such as a collision, and the rule is well established that if the passenger acts as a reasonably prudent person would have done in view of the danger as it appeared to him, he is not guilty of contributory negligence so as to bar his right of recovery against the carrier, although, if he had not acted thus in the attempt to avoid injury, he would have been safe."

The instinctive effort of a passenger, or his impulsive or unguarded act, resulting in injury, while trying to avoid danger, in a reasonable and well-grounded fear that a collision was about to take place, or an accident occur which would result in serious injury, due to the mismanagement of the carrier, does not relieve the carrier from responsibility, but is to be deemed a consequence of such mismanagement for which the carrier is responsible, and a presumption of negligence on the part of the carrier arises because of the injuries received. *Nellis Street Railroad Accident Law*, 213, and cases cited.

In the case of *Twomley v. Central Park, etc., R. Co.*, 69 N. Y. 158, 25 Am. Rep. 162, the plaintiff was a passenger in one of the defendant's horse cars; the driver drove the car upon the tracks of a steam railroad directly in front of an approaching train; all of the passengers, including the plaintiff,

chain, the plaintiff cannot recover. Ans. This is affirmed. If there was no other negligence on the part of the defendant, and when the motorman who was running the car that was approaching the car on which the plaintiff was riding saw that car, and he applied the brakes, and the car slackened as he stated, that the brake chain broke, and the car ran on and came in contact in the manner in which it was said; if it was in consequence of the breaking of the chain, and the company had used the appliances and the cars such as are in common use—then they would not be liable. If it was in consequence of the breaking of the chain, then you are to take into consideration, in this respect, the evidence as to the care with which the cars were inspected in determining that question.”

The court charged in part as follows: “Now, gentlemen of the jury, the first question which we submit to you is this: From all the evidence on the part of the plaintiffs and on the part of the defendant, was the defendant guilty of any negligence in the matter? If the defendant was not guilty of negligence, then there can be no recovery. Where an accident happens and an injury takes place by collision, and a passenger is injured in the collision, there is a presumption of negligence, and, had Mrs. Palmer remained on the car and had been injured in the collision which occurred, there would have been a presumption of negligence on the part of the company, which the company could rebut by testimony. But in this case we say to you it is incumbent upon the plaintiffs to show negligence, and convince you of negligence. We say to you that we do not think the fact that there was a car coming from Irwindale Park and another one going, and on the same track, that that

on perceiving the danger rushed to the doors of the car and jumped off and the plaintiff was injured; the driver succeeded in getting the car across the track in time to escape the train; it was held that the case was properly submitted to the jury and a verdict in favor of the plaintiff was justified. The court, in its opinion, said: “The jury have found that the plaintiff was placed by the reckless or careless acts of the servants and agents of the defendant in such a position as compelled her to choose upon the instant, and in the face of an apparently great and impending peril, between two hazards—a dangerous leap from the moving car, or to remain in the car at certain peril. They have also found that her action was such as might have been taken by any one of ordinary prudence, placed in the same situation, and was not the result of an unreasonable alarm, and that the injury was the result of such enforced action. The verdict was that the misconduct of the persons in charge of the car was the proximate cause of the injury, without concurrent negligence on the part of the plaintiff. The peril of remaining in the car was properly judged by the circumstances as they then appeared to the passengers, and not by the result. The fact that the car did pass over safely cannot be reflected upon the action of the plaintiff, and does not prove that she was imprudent or negligent in jumping from the car; she was compelled to act, and choose the hazard which appeared to be the least, that is, to act upon the probabilities as they appeared at the time.”

of itself would constitute negligence. It is different in relation to the conduct of a street car, we think, from that of the steam cars, which run at a much greater rate of speed; and the fact that these two cars were going toward each other on the same track of itself would not be negligence. It might have been the intention of the motorman to transfer passengers. That might occur, and sometimes is the case. Now, gentlemen of the jury, she would not be justified in jumping from the car unless there was danger — unless she was suddenly put in imminent danger — of being injured in some way, and exercised her best judgment as to what she should do; where if she was put in a sudden peril as to life or limb, if she had a well-founded belief, growing out of the circumstances and facts, that she was in imminent danger, then she would be justified in jumping and would not be guilty of contributory negligence. * * * Weigh this matter carefully and determine from the evidence on the part of the plaintiffs and the evidence on the part of the defendant whether or not the plaintiff was in such imminent peril as to justify her in jumping. If she was, then she would not be guilty of contributory negligence."

George H. Higgins and Allen & Son, for appellants.

W. E. Rice and W. D. Hinckley, for appellee.

Opinion by BROWN, J.

Mrs. Kate Palmer was a passenger on an electric car of the defendant company. As it approached an up grade, a car with a trailer attached was seen descending and coming toward it on the same track. The brake chain on the descending car had broken, and the motorman was unable to control it. The motorman of the car on which the plaintiff was riding, seeing that a collision was inevitable, stopped his car, and, having reversed the current, started it backward. The other cars were gaining on it, until it seemed that the collision could not be avoided, and a number of the passengers on the car with Mrs. Palmer, including herself, jumped from it just before the cars collided. For the injuries sustained in jumping from the car this suit was brought. The case was submitted to the jury under what the appellants regard as erroneous instructions, and, the verdict having been for the defendant, this appeal was taken.

The real error complained of is the trial judge's instruction to the jury that there was no presumption of the defendant's negligence. Upon this point he said, in his general charge:

"Now, gentlemen of the jury, the first question which we submit to you is this: From all of the evidence on the part of the plaintiffs and on the part

of the defendant, was the defendant guilty of any negligence in the matter? If the defendant was not guilty of negligence, then there can be no recovery. Where an accident happens and an injury takes place by a collision, and a passenger is injured in the collision, there is a presumption of negligence; and had Mrs. Palmer remained on the car and had been injured in the collision which occurred, there would have been a presumption of negligence on the part of the company, which the company could rebut by testimony." He added in the same connection: "But in this case we say to you, it is incumbent upon the plaintiffs to show negligence, and convince you of negligence."

This instruction that there was no presumption of the company's negligence was repeated in the court's answers to plaintiffs' first and defendant's third points. If Mrs. Palmer had remained on the car and been injured by the collision, no one would think of questioning the presumption of the defendant's negligence. The collision itself, without more, would have been evidence that some one in the employ of the company had blundered, or neglected his duty. As a matter of fact, the collision was due to the breaking of a brake chain; but the case was within the unbending rule, applicable to railroad and street passenger railway companies alike, that, where a passenger on a car is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the onus of rebutting it. *Laing v. Colder*, 8 Pa. St. 479, 49 Am. Dec. 533; *Sullivan v. Philadelphia & Reading R. Co.*, 30 Pa. St. 234, 72 Am. Dec. 698; *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225, 3 Am. Rep. 581; *Philadelphia & Reading R. Co. v. Anderson*, 94 Pa. St. 351, 39 Am. Rep. 787; *Fleming v. Pittsburg, etc., Ry. Co.*, 158 Pa. St. 130, 27 Atl. 858, 22 L. R. A. 351, 38 Am. St. Rep. 835; *Clow v. Pittsburg Traction Co.*, 158 Pa. St. 410, 27 Atl. 1004; *Dixey v. Philadelphia Traction Co.*, 180 Pa. St. 401, 36 Atl. 924; *Kepner v. Harrisburg Traction Co.*, 183 Pa. St. 24, 38 Atl. 416. And it is immaterial that the collision was not due to any defect in the car on which the plaintiff was riding, or the machinery connected with it, but to a broken appliance on the car that ran into it; for the presumption of the defendant's negligence arises not only when the injury is caused by a defect in the road, cars, or machinery, or by want of diligence or care in those employed, but by any other thing which the company can and ought to control as a part of its duty to carry the passenger safely. *Meier v. Pennsylvania R. Co.*,

supra. The other thing here which was under the control of the company was the chain that broke on another car which ran into the one on which the plaintiff had been a passenger.

But the plaintiff was not bound to wait for the collision. It was rather for her, under the instinct of self-preservation, to try to escape from its danger, and, in seeking to avoid it, she is not necessarily chargeable with neglect of her own safety in exposing herself to another risk by jumping from the car. The company had confronted her with the peril from which she would have escaped, and it is and ought to be responsible to her for whatever naturally followed. In trying to save herself, she was, at the same time, unconsciously trying to save the company from the consequences of its negligence, and of her effort to do so it ought to be the last to complain, unless it is manifest that she acted rashly and imprudently.

"In such a case the author of the original peril is answerable for all that follows. * * * If, therefore, a person should leap from the car under the influence of a well-grounded fear that a fatal collision is about to take place, his claim against the company for the injury he may suffer will be as good as if the same mischief had been done by the apprehended collision itself. When the negligence of the agent puts a passenger in such a situation that the danger of remaining on the car is apparently as great as would be encountered in jumping off, the right to compensation is not lost by doing the latter; and this rule holds good even where the event has shown that he might have remained inside with more safety." *Penna. R. Co. v. Aspell*, 23 Pa. St. 147, 62 Am. Dec. 323.

To this we can add nothing, except that a well-grounded fear that a collision is about to take place, which will result in fatal or even serious injury to the passenger, is a justification to him to leap from the car; and the presumption of the common carrier's negligence is not confined to the case of injuries resulting from actual collision, but extends to those caused by an effort to escape it, when made on a well-grounded belief that it will occur. The collision itself would admitted^{ly} be due to the presumed negligence of the company, and to no other cause can be attributed the manifest danger of it, from which the plaintiff in this case attempted to escape. The court's instructions, therefore, should have been that there was a presumption of the company's negligence, and that there was no burden upon the plaintiff to prove it until the defendant had first rebutted the presumption of it.

In affirming the defendant's fifth point the court fixed too low a standard for the duty of the railway company. More is required of a common carrier than mere reasonable precaution against injuries to passengers, and care that its cars and appliances are to be measured by those "in known general use." While the law does not require the utmost degree of care which the human mind is capable of imagining, it does require that the highest degree of practical care and diligence shall be observed that is consistent with the mode of transportation adopted; and cars and appliances are to be measured by those which have proved by experience to be the most efficacious in known use in the same business. The rule upon this subject, as laid down in *Meier v. Pennsylvania R. Co.*, *supra*, and which should have been followed by the court in answering the point, is:

"The utmost care and vigilance is required on the part of the carrier. This rule does not require the utmost degree of care which the human mind is capable of imagining; but it does require that the highest degree of practical care and diligence should be adopted that is consistent with the mode of transportation adopted. Railway passenger carriers are bound to use all reasonable precautions against injury of passengers; and these precautions are to be measured by those in known use in the same business which have been proved by experience to be efficacious. The company is bound to use the best precautions in known practical use. That is the rule—the best precautions in known practical use to secure the safety of the passengers; but not every possible preventive which the highest scientific skill might suggest."

No error was committed in saying that the fact that there was a car coming and going on the same track was not in itself evidence of negligence by the defendant company, and the fifth assignment is not sustained. The court's instructions should have made it clear that, if the jury should find the plaintiff acted from a well-grounded fear of imminent danger, she was not guilty of contributory negligence in jumping from the car. In the portion of the charge complained of in the sixth assignment the jury might have understood that, unless there was actual danger, and she jumped to escape it, she would be guilty of negligence. As the instruction upon this point was not clear, the sixth assignment is sustained. In sustaining the seventh, we need only say that the question asked Dr. Stewart was proper, and should have been allowed.

All of the assignments except the fifth having been sustained, the judgment is reversed, and a new trial awarded.

Baltimore & Ohio Railway Co. v. Butler Passenger Railway Co.

(Pennsylvania — Supreme Court.)

STREET RAILWAY CROSSING STEAM RAILROAD AT GRADE;¹ CONSTRUCTION OF STATUTE; INJUNCTION.— A statute (Act of June 19, 1871, P. L. 1360), providing that courts shall, if it is reasonably practicable to avoid a grade crossing, by their process prevent a crossing at grade, should be liberally construed and rigidly enforced. The only question to be determined is whether it is reasonably practicable to avoid a grade crossing, and, if so, the statute is mandatory that the court shall prevent it. In determining the practicability public safety shall control rather than the cost and expense of constructing an overhead crossing. It appearing that a steam railroad crosses a street in a depression, and that the estimated length of an overhead structure for the use of a street railway crossing such steam railroad is about 800 feet, and that the erection of such structure is physically practicable, and it further appearing that a large number of trains were running upon the steam railroad daily, and that the street itself was much used, the court will restrain by injunction the crossing of the steam railroad tracks by the street railroad at grade.

APPEAL by plaintiff from a decree for the defendant. Decided January 4, 1904. Reported 207 Pa. St. 406, 56 Atl. 959.

The court below entered the following decree:

"And now, to wit, August 15, 1903, this cause came on to be heard at this term, and was argued by counsel, and, upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz.:

"(1) It is not reasonably practicable, in the construction and operation of the street railway system of the defendant company upon Center avenue, in the borough of Butler, Pennsylvania, at the point where the track crosses the tracks of the Baltimore & Ohio Railroad Company, operating the Pittsburg & Western railroad, to avoid a crossing at grade.

"(2) That the Butler Passenger Railway Company, and its successors in the franchise, shall have the right to construct and operate its road on Center avenue, in said borough of Butler, across the roadway and tracks of the Baltimore & Ohio Railroad Company, operating the Pittsburg & Western railroad, at grade, subject to the payment hereafter, when legally ascertained,

1. As to street railways crossing steam railroads, see *Boston & M. R. Co. v. Saco Valley Elec. R. Co.*, 2 St. Ry. Rep. 376, (Me.) 56 Atl. 202; *West Jersey & S. R. Co. v. Atlantic & Sub. Tract. Co.*, 2 St. Ry. Rep. 717, (N. J. Eq.) 56 Atl. 890. See also monographic note, 1 St. Ry. Rep. 140-149.

of such damages as the plaintiff company may thereafter sustain, arising from the negligence of the defendant company in the operation of said crossing.

"(3) Such crossing shall be constructed by the defendant company at its own cost under the supervision of the plaintiff company's engineer or agent, the representatives of plaintiff company to be appointed and ready to act within ten days after request to this effect made by the defendant company. Upon failure of such engineer or agent to act after such notice given, the defendant company may proceed without delay to construct such crossing.

"(4) That the said crossing shall be kept in good condition by the defendant company as to repairs and renewals, and at its expense. In case of the failure of the defendant company, upon notice from the plaintiff company, for the period of one week thereafter, to make such repairs and renewals as may be required, the same may be made by the plaintiff company, and the reasonable expense thereof recovered by it from the defendant.

"(5) The defendant company shall construct and maintain derailing switches upon Center avenue on both sides of the tracks of the plaintiff company; the switch upon the east to be at least sixty feet east of the main track, and that upon the west to be at least sixty feet west of the most western track. The lever operating east-bound cars shall be placed east of the main track, and that for operating the west-bound cars shall be placed immediately west of the main track.

"(6) Before entering upon or crossing over the tracks of plaintiff company, each car of defendant company shall come to a full stop at least sixty feet from the nearest track in the line of approach, and the conductor thereof shall go upon the track of the plaintiff's road, look and listen for approaching trains. He shall then, if the tracks are clear of approaching trains, signal the motorman of the car to proceed. Until such signal is given no car shall cross the tracks.

"(7) The defendant company shall construct and maintain an effective and approved system of electric signals, which will indicate upon Center avenue by the ringing of a bell in the daytime and by a colored light at night, the approach of a train on the plaintiff's road at any point within 200 feet both north and south of Center avenue.

"(8) The costs of this proceeding shall be paid by the defendant company.

"(9) The preliminary injunction heretofore granted, restraining defendant company from crossing the tracks of the plaintiff company upon Center avenue, is hereby dissolved, and, upon compliance by the defendant company with the conditions of this decree to be performed by them, the plaintiffs' bill is dismissed.

"(10) That either party to this bill may, upon ten days' written notice, where a shorter time has not already hereinbefore been fixed, to be given to any of the officers of the other company, apply to the court, if in session, and, if not in session, at chambers, for further advice, and for such modification or addition to these regulations as experience and observation in relation to grade crossings show that the safety of persons or property seem to require."

R. P. Scott, for appellants.

James Bredin, T. C. Campbell, P. W. Lowry, and A. E. Reiber, for appellee.

Opinion by *MESTREZAT, J.*

The Pittsburgh & Western Railroad Company owns and operates, through its lessee and coplaintiff, the Baltimore & Ohio Railroad Company, a railroad from Allegheny City, Pa., to Foxburg, Pa. The road, which has been in operation about twenty years, passes north and south through the borough of Butler, and crosses at grade, and almost at right angles, Center avenue — one of the principal and much-traveled streets of the borough. Of the three tracks that cross the avenue, one is used as the main line, while the other two are used for switching purposes. The passenger station of the plaintiffs is about 180 feet north of the crossing, the freight station is sixty-seven feet west of the passenger station, and the turntable and water tank are a short distance south of the crossing. The defendant company was incorporated under the act of May 14, 1889 (Laws 1889, p. 211), with authority to construct and operate a street railway in the borough of Butler. On October 5, 1899, an ordinance was duly enacted, authorizing the company to construct a railway upon Center avenue and other streets of the borough. In pursuance of this authority the defendant company proceeded to construct a single line of railway along Center avenue, with the intention of crossing the tracks of the Pittsburgh & Western railroad at grade. When the road had been constructed to a point within a short distance of the plaintiffs' tracks, this bill was filed, averring that a grade crossing was unnecessary and exceedingly dangerous, and that it was reasonably practicable to avoid it, and praying the court so to decree, or, if a grade crossing were permitted, to define the mode and manner of crossing. A cross-bill was filed by the defendant company, which prayed that the Baltimore & Ohio Railroad Company and the Pittsburgh & Western Railroad Company be enjoined from interfering with the defendant railway company in the construction of its road at grade across the tracks of the Pittsburgh & Western railroad on Center avenue, that it be decreed that it is not reasonably practicable to avoid a grade crossing, and that the court, by decree, prescribe the neces-

sary regulations to be observed by said companies for the operation of the crossing, and the conduct of their business relative thereto. The learned trial judge found the facts against the averments of the plaintiffs, refused their prayer for an injunction, and entered a decree permitting the defendant company, under certain prescribed regulations, to cross the plaintiffs' tracks at grade on Center avenue. From that decree this appeal was taken.

This is a contest between corporations, and their rights must be determined under the Act of June 19, 1871 (P. L. 1360), entitled "An act relating to legal proceedings by or against corporations." The second section of the act declares:

"When such legal proceedings relate to crossings of lines of railroads by other railroads, it shall be the duty of courts of equity of this commonwealth to ascertain and define, by their decree, the mode of such crossing which will inflict the least practicable injury upon the rights of the company owning the road which is intended to be crossed; and if, in the judgment of such court, it is reasonably practicable to avoid a grade crossing, they shall by their process prevent a crossing at grade."

The statute has been frequently construed and enforced by this court. "The act," says Paxson, C. J., in *Perry County Railroad Extension Co. v. Newport, etc., R. Co.*, 150 Pa. St. 193, 24 Atl. 709, "does not put the rights of the company desiring to cross the railroad of another on a level with the rights of that company, but manifestly declares them to be secondary. Two thoughts are clearly expressed in this statute—the one, that no unnecessary injury shall be perpetrated on the road sought to be crossed; the other, that crossings at grade shall be prevented whenever they can reasonably be avoided." And in the same case it is said: "The time for grade crossings in this State has passed. They ought not to be permitted except in case of imperious necessity. They admittedly involve great danger to life and property." In *Pennsylvania R. Co. v. Braddock Electric Ry. Co.*, 152 Pa. St. 116, 25 Atl. 780, Sterrett, J., says: "The manifest purpose of this [second section of the act] is not merely to discourage grade crossings because of their danger to the public, as well as injury to the company whose road is crossed, but also to prevent them whenever, in the judgment of the court, it is reasonably practicable to avoid such dangerous and injurious crossing."

In defining the duty of the courts under the second section of the act, Dean, J., in *Scranton, etc., Traction Co. v. Delaware & Hudson Canal Co.*, 180 Pa. St. 636, 37 Atl. 122, says:

"So far as the possible may be considered the practicable, there are very few points on the surface of the State where other than grade crossings are not practicable. * * * In the first place, we must assume, because the Legislature in this enlightened age has impliedly so assumed, that it is unwise, if not reckless and barbarous, to unnecessarily subject the traveling public and the employees of carrying corporations to the death, maiming, and horrors of collisions which inevitably result from grade crossings. And if it be reasonably practicable to avoid a grade crossing, then the question as to what extent the risk of such a crossing may be reduced is immaterial, for the law assumes and experience demonstrates that extraordinary care by both parties using such crossing, aided by all the advances in science and mechanics, has only resulted in lessening the risk, and not abolishing it. In deciding, therefore, what is reasonable, we are bound to keep in mind the consequences to be avoided. * * * Safety is the object in view, and, therefore, in determining what is reasonable, we must balance expense and difficulty against loss of life and limb."

In *Pennsylvania R. Co. v. Warren Street Ry. Co.*, 188 Pa. St. 74, 41 Atl. 331, it was held that, in determining whether it was practicable to avoid a grade crossing, the court would not consider the unsightliness of an overhead structure as of any consequence, nor give weight to the fact that damages might have to be paid to the owners of private property by reason of the erection of the structure. It is also said in that case that consideration of the probabilities or improbabilities of collisions by reason of extraordinary precautions to be prescribed in the decree is not an element in the determination of the question whether it is reasonably practicable to avoid a grade crossing. And in the very recent case of *Pittsburg & Lake Erie R. Co. v. Lawrence County*, 198 Pa. St. 1, 47 Atl. 955, Mitchell, J., in concluding the opinion of the court, says: "It must, therefore, be accepted as the settled policy of the State, as administered by this court, that, wherever the subject comes within its jurisdiction and control, no grade crossing of a railroad over another railroad or a common highway will be permitted except in case of manifest and unavoidable necessity."

These and other decisions of this court construing the Act of 1871 make it manifest that the statute will receive a literal construction, and that it will be rigidly enforced. The Legislature,

recognizing the danger to human life and to property in the grade crossing, intended by this act to confer upon the courts the authority, not to minimize, but entirely to remove, the danger, by preventing the crossing wherever it is reasonably practicable to do so. In all cases of a proposed grade crossing, therefore, the only question is whether it is reasonably practicable to avoid it, and, if so, the statute is mandatory that the court shall prevent it. In determining this question, the plain purpose of the statute — to protect life and property — is not to be ignored or disregarded. Experience teaches with absolute certainty that a grade crossing is unsafe, and that its existence is a standing menace to human life. This fact should be kept constantly in mind in adjudicating the rights of railway companies in proceedings under the Act of 1871. No light, trivial, or financial consideration, under a proper interpretation of the statute, can be invoked to sanction the imperiling of human life by permitting a grade crossing.

We do not think the facts in this case justified the learned trial judge in his conclusion that it was not reasonably practicable to avoid a crossing of plaintiffs' tracks by defendant's road at grade on Center avenue. His opinion discloses his reasons, and also the fact that he gave weight to certain considerations which should have no place in determining the question he was required to solve. As a basis for his conclusion, he finds and states that the travel on Center avenue is heavy, and the street is necessary to connect the old and new parts of the town; that the trains always stop at the station, and hence must necessarily pass slowly over the street; that there has been no accident at the proposed point of crossing; that the defendant company has not obtained the consent of the borough for an overhead structure, and that such structure would occupy more of the street than is available, and the damages sustained by the owners of private property along the street, occasioned by the erection of the structure, would be very heavy; that the bridge over Connoquenessing creek, as at present constructed, would not support the viaduct; and that an overhead structure would interfere with travel on the street, would frighten horses, would obstruct the view of coming trains, and thereby endanger the safety of those using the street, would be unsightly, and would impose such an expense upon the defendant company as to prohibit the construction of its road. He also found

that, under the circumstances of the case, "the railroad crossing upon Center avenue is a safe crossing, the element of danger being reduced to a minimum." Under his findings of fact, the learned judge held "that an overhead crossing, instead of a grade crossing, would be simply the substitution of one danger for another, at a large expenditure of money without any compensating good," and accordingly refused to enjoin the defendant company from crossing the plaintiff's tracks at grade.

We are convinced, however, by the testimony and the facts found by the court below, that the crossing of the plaintiffs' road on Center avenue by the defendant company's tracks would be most dangerous, and can and should be avoided. On the east side of the railroad the street descends to the tracks on a grade over eighteen feet in a distance of 356 feet, and on the west side it descends from McKean street, crossing the tracks of the Pittsburg & Bessemer railroad, to Connoquenessing creek, which is about 150 feet west of, and parallel with, the plaintiffs' road. In other words, the plaintiffs' railroad is approached from both directions on Center avenue on a descending grade, and on the west by crossing a bridge over the creek and the tracks of another railroad about 280 feet distant. As the learned judge finds, this will likely become one of the defendant's main lines of traffic in the borough, and will possibly carry more passengers than any other part of its road. The population in the southeast part of the town is already large, and is rapidly increasing, and they would use the line on Center avenue in going to the main or principal business part of the borough. At present 1,000 vehicles, as well as a very large number of pedestrians, pass over the crossing daily. It also appears that thirty-four scheduled trains on the plaintiffs' road pass daily over this crossing, "in addition to which there is usually a large number of extra trains, shifting engines," etc. Notwithstanding these facts, the trial judge finds the crossing would be safe to a minimum degree.

We are wholly at a loss to understand by what process of reasoning the learned judge reached his conclusion. Universal experience unquestionably leads to a different result. It is true, he says, that at this point the passenger trains "are slowed up ready for stopping," that the engineers can see the crossing for a long distance, and that an observer standing on the crossing can see along

the railroad 1,000 feet in both directions. But these facts do not eliminate the danger at the crossing. As the plaintiffs control the management of the trains on their road, they are at liberty, at any time they think the traffic justifies it, to make a schedule on which through trains may be run without stopping at Butler. The fact that so many extra trains are now running on the road would seem to indicate that there is at this time a necessity for a through service. The large number of shifting engines which the court finds pass over the crossing would not stop or be controlled in their movements by a schedule. All freight trains would not necessarily stop at the station. Some certainly would not. It is, therefore, apparent that the safety of the crossing should not be made to depend upon the stopping of some of the passenger trains at the station. Nor is the fact that an approaching train can be seen at a great distance by a person standing on the tracks at Center avenue any protection to those who are approaching and about to pass the crossing. They could not see the train from either direction, for the learned judge has himself found that "from McKean street eastward to plaintiffs' tracks, and for several squares beyond that point, both sides of Center avenue are quite closely built up with residences, stores, and manufacturing establishments." It is hardly necessary to suggest that, to avoid a collision and insure safety, the conditions at the crossing should permit the traveler to see an approaching train before as well as after he is on the track. If the crossing of Center avenue by the Pittsburg & Western railroad is dangerous to pedestrians and others using the street, as the facts reported by the trial judge conclusively demonstrate, it is quite evident that it would be more dangerous to life and property for an electric railway to cross at grade the tracks of the steam road at this point. In fact, the learned judge himself recognizes the danger of such a crossing, and in his decree attempts to avert it by prescribing certain regulations in the use of the crossing. He says that these precautions will prevent a collision, "unless the engineer and the conductor on the street car jointly contribute thereto through gross negligence." It was to avoid the consequences of the negligence, as well as of the recklessness or the stupidity of the servants of corporations, and as a protection against such causes of danger, that the act of Assembly declared that where it is reasonably practicable the courts

“shall by their process prevent a crossing at grade.” The Legislature, in the enactment of the statute, also recognized the imperfection of human appliances, and the probability of the failure to perform their functions. These were the reasons that moved the lawmaking power nearly a third of a century ago to declare that crossings should be abolished in the Commonwealth wherever it is at all practicable to do so. Experience has verified the wisdom of such legislation, and demands its rigid enforcement.

The court below entered a decree “that it is not reasonably practicable to avoid a grade crossing of plaintiffs’ tracks by defendant on Center avenue.” In arriving at this conclusion the trial judge seems to have been controlled principally by the following considerations: The demands of the public require the extension of the defendant’s railway into the town of Springdale, and the only practicable route for the extension is over Center avenue; such extension involves the necessity of crossing plaintiffs’ road; an overhead crossing would be prejudicial to business interests along that portion of the street occupied by the structure, and would be dangerous to people traveling on said street. From the authorities cited above, it would seem that these considerations should have little weight in determining the question whether it is reasonably practicable to avoid a grade crossing. No local sentiment favorable to increased facilities for local travel and communication should swerve the court from its duty to carry out strictly the intent of the statute. *Williams Valley R. Co. v. Lykens, etc., St. Ry. Co.*, 192 Pa. St. 552, 44 Atl. 46. We have also held that whether an overhead crossing is reasonably practicable is not to be determined by the financial ability of the road seeking to cross, but by the physical practicability of avoiding the grade crossing. *Chester Traction Co. v. P., W. & B. R. Co.*, 188 Pa. St. 105, 41 Atl. 449, 44 L. R. A. 269. The cost and difficulties of constructing its road are for the consideration of a railroad or railway company when it selects its route, and will not control the court in determining the practicability of an overhead crossing. The litigant railway corporations are not the only persons concerned in the crossing of their roads, but the public who use the trains have the right to demand the avoidance of a grade crossing if it is reasonably practicable to do so. The necessity

for the road as a means for transportation, the expense attending its construction and maintenance, and the business interests of the owners of property along its route, are all commercial considerations subordinate to the safety of the public who patronize the roads, and of the employees who operate them. Hence, keeping in mind the manifest purpose of the statute conferring authority on the court to regulate or prevent grade crossings, it follows that what is physically practicable in constructing an overhead crossing must largely determine what is reasonably practicable.

We are satisfied from the topography of the ground in the vicinity of the proposed crossing that it is physically practicable to construct an overhead crossing. The great preponderance of the evidence shows the fact, and it is in effect admitted by the trial court. The steam railroad crosses the street in a depression, the surface of the ground ascending in both directions from the tracks. On the east the ascent is immediate, and at a distance of 356 feet attains a height of 18.35 feet. On the west the ascent begins about 200 feet from the tracks, and continues to McKean street, where, at a distance of 700 feet from the tracks, the elevation is about thirty feet. The estimated length of the overhead structure is about 800 feet. The witnesses interrogated with reference to the subject do not agree as to the cost of the construction of the viaduct. But as to the physical practicability of the erection of the structure there is very little, if any, disagreement among the witnesses. The proposed overhead structure to be used by the defendant's railway would not only avoid the crossing at grade of the plaintiffs' tracks, but also those of the Bessemer railroad which intersects Center avenue at or near the foot of a steep grade. It would also give the public the use of the county bridge across Connoquenessing creek, relieved from the annoyance and inconvenience incident to the operation of the street car line upon it. We need not concern ourselves about the insufficiency of the present bridge to support the viaduct. That is a matter for the consideration of the street railway company, and may be easily remedied. It in no way militates against the advisability of an overhead crossing. We are convinced from the evidence that it is reasonably practicable for the defendant company to avoid crossing the plaintiffs' tracks at grade on Center avenue. It, therefore, follows that the trial

court should have granted an injunction as prayed for in the plaintiffs' bill.

The decree of the court below is reversed at the costs of the appellee, the bill is reinstated, and an injunction is directed to be issued, perpetually enjoining the defendant company against crossing the tracks of the Pittsburg & Western railroad at grade on Center avenue, in the borough of Butler. The cross-bill is dismissed at the costs of the defendant company.

Parker v. Washington Electric Street Railway Co.

(Pennsylvania — Supreme Court.)

INJURY TO CHILD PASSENGER; CONTRIBUTORY NEGLIGENCE.—The plaintiff, a boy seven years and eight months old, was a passenger on one of the defendant's cars, and was permitted by the motorman, who had sole charge of the car, to ride upon the platform. The plaintiff went upon the platform to notify the motorman as to the place where he wished to get off. When near the crossing where he wished to get off he stepped down upon the step and jumped off and was injured. Upon the question as to the plaintiff's contributory negligence the court held that the measure of a child's responsibility for contributory negligence is his capacity to understand and avoid danger. The standard of responsibility is the average capacity of others of the same age and experience, and to this standard the child should be held in the absence of evidence on the subject. The question of responsibility being one which depends upon the knowledge and experience of the child and on the character of the danger to which he is exposed is for the jury. It was further held that the danger to which the jury found that the plaintiff in this case was negligently exposed was not one that the average boy under eight years of age would understand.

APPEAL by defendant from judgment for plaintiff. Decided January 4, 1904.
Reported 207 Pa. St. 438, 56 Atl. 1001.

Plaintiff presented this point: "If the jury find from the evidence that the motorman permitted the plaintiff Charles Parker to go on the front platform, and to remain there while the car ran a distance of from 1,000 feet to half a mile, this was such negligence as will render the company liable for any injury which the boy sustained by reason of his being permitted to ride on the front platform. Ans. Affirmed."

Defendant presented this point: "If the jury believe from the evidence that the plaintiff Charles D. Parker did actually know the danger in which he placed himself by attempting to alight from the front platform of a mov-

ing car, and that, knowing this fact, he did attempt to jump off the car while in motion, he was then guilty of contributory negligence, and cannot recover in this case, and the verdict must be in favor of the defendants. *Ans. Refused.* We do not think that the evidence in this case is sufficient to rebut the presumption that a boy seven years and eight months old is not capable of being guilty of contributory negligence, in a legal sense."

John H. Murdoch and Edgar B. Murdoch, for appellant.

R. W. Irwin and George B. Parker, for appellee.

Opinion by FELL, J.

The plaintiff, a boy seven years and eight months old, unaccompanied by any one, was received as a passenger on one of the defendant's cars. Soon afterward the conductor, in pursuance of a regulation of the company, left the car in charge of the motorman, who had the entire management of it over a part of the line on which the travel was light. After the conductor had left the car, the plaintiff opened the front door, and went out on the platform to tell the motorman where he wanted to get off. He remained on the platform, with the motorman's knowledge, and without objection or warning, while the car ran a distance estimated by one witness as 1,000 yards and by another as half a mile. When near the crossing where he wished to get off, the plaintiff stepped down on the step, and held fast to the railing. As the car passed the crossing, he either stepped or jumped off, and was injured. The court left it to the jury to find whether the motorman was negligent in permitting the boy to ride on the front platform, but declined to submit the question of the plaintiff's contributory negligence.

The measure of a child's responsibility for contributory negligence is his capacity to understand and avoid danger. In analogy to the common-law rule of responsibility for crimes committed, a child under seven years of age has been conclusively presumed to be incapable of appreciating and guarding against danger; and after seven the presumption of incapacity, although not irrebuttable, and growing less strong with each year, continues until fourteen, when the presumption of capacity arises. But these are only convenient points in the uncertain line between capacity and incapacity, at which the law changes the presumption. The

standard of responsibility is the average capacity of others of the same age and experience, and to this standard a child should be held, in the absence of evidence on the subject, *Kehler v. Schwenk*, 144 Pa. St. 348, 22 Atl. 910, 13 L. R. A. 374, 27 Am. St. Rep. 633. It follows that as responsibility depends upon the knowledge and experience of the child, and on the character of the danger to which he is exposed, generally the question is one for the jury, and not for the court. This must always be so when the facts are in dispute, or the inferences to be drawn from them are doubtful. But in clear cases, where the facts are settled, and there can be no reasonable doubt as to the inferences to be drawn, the question may be determined by the court as matter of law. In *Taylor v. Hudson & Delaware Canal Co.*, 113 Pa. St. 162, 8 Atl. 43, 57 Am. Rep. 446, a girl eight years of age, following a footpath which passed diagonally across the tracks of a railroad, stepped in front of a train standing on a switch, and was struck by a locomotive on the main track, of the approach of which she was not aware. It was held that, because of her age, she could not be charged with negligence, and that the question of contributory negligence did not arise in the case. In *Nagle v. Allegheny Valley R. Co.*, 88 Pa. St. 35, 32 Am. Rep. 413, it was held that the presumption that a boy of fourteen knew and could avoid the danger of crossing a railroad track would prevail, and that, in the absence of evidence of the want of such intelligence and discretion as is usual in those of his age, there could be no recovery for his death.

It may safely be said that the danger to which the jury found that the plaintiff was negligently exposed was not one that the average boy under eight years of age would understand. He could be held only to the standard of intelligence and caution of a boy of that age. The presumption in his favor was strengthened by the only evidence on the subject — elicited on cross-examination — that he did not know that there was any danger in riding on the front platform of the car. There was testimony by the defendant that the plaintiff had been seen by the conductor standing on the platform, and had been sent into the car. This testimony did not show that the plaintiff had perversely and persistently disobeyed a proper direction, and disregarded a danger of which he had been warned. No explanation accompanied the direction,

and it was promptly obeyed. After the conductor had left the car, the plaintiff went onto the platform for a proper purpose — to tell the motorman where he wished to get off — and he remained there with the motorman's tacit consent.

The judgment is affirmed.

Nelson v. Oil City Street Railway Co.

(Pennsylvania — Supreme Court.)

INJURY TO MOTORMAN IN COLLISION; ASSUMPTION OF RISK.¹— The plaintiff's intestate, a motorman on one of the cars of the defendant, was killed in a collision between his car and a work car standing nearly stationary at a curve in the road. The defendant operated a single track upon which cars were operated in both directions, passing at switches. Motormen were instructed to look out for the work car which had been in use for a number of years. The decedent's car was being operated at a rate of twelve miles an hour. It was held that, since the danger involved in the use of the work car could be avoided by the exercise of reasonable care on the part of the motorman, and since such car had been constantly used, the danger resulting from its presence on the track was a risk of the employment assumed by the decedent.

APPEAL by plaintiff from judgment for defendant. Decided January 4, 1904.
Reported (Pa. St.) 56 Atl. 933.

Peter M. Speer and *Isaac Ash*, for appellant.

William J. Breene and *Edmond C. Breene*, for appellee.

Opinion by FELL, J.

The plaintiff's husband, while in the employ of the defendant company as a motorman, was fatally injured in a collision between his car, which was running twelve or fifteen miles an hour, and a work car which was standing or was nearly stationary at a curve in the road. The company had but a single track, on which the cars ran in both directions, passing each other at switches constructed at intervals along the line. There was a regular schedule for the running of the passenger cars, but none for the

1. For other cases in this series relating to the liability of a street railway company for injuries to an employee, see cases cited in note to *Indianapolis & Greenfield R. T. Co. v. Foreman*, *ante*, p. 206.

work car, as it was moved from place to place as it became necessary to do so in carrying on the work of repair and construction. Motormen of the passenger cars were instructed to look out for the work car, and the motorman of that car was instructed to keep out of the way of the passenger cars, by conforming as nearly as possible to their schedule, and running in the same direction ahead of or behind them. The deceased had been in the service of the company as a motorman for several years, and during all this time the work car had been in use. On the day of the accident, and on several days preceding it the work car had been run to one end of the line where construction work was being done. Some machinery in the power-house had been injured by lightning and all the cars were behind time. Various grounds of negligence were alleged in the plaintiff's statement of claim, but the only one contended for at the trial relates to the manner in which the defendant operated its work car. Since this car was used as necessity required, and often in sudden emergencies, it was evidently impracticable that its movements should be regulated by a fixed schedule. There was no danger in its use that could not be avoided by the exercise of reasonable care on the part of the deceased. Moreover, there was such an habitual use of the car that whatever danger might result from its presence on the track was a risk of the employment, open, manifest, and fully known to the deceased, and assumed by him without objection. It follows that there was no error in entering a nonsuit. *Brossman v. Lehigh Valley R. Co.*, 113 Pa. St. 490, 6 Atl. 226, 57 Am. Rep. 497.

The judgment is affirmed.

Other Cases in the Supreme Court of Pennsylvania not Reported in Full.

1. INJURY TO CONDUCTOR ATTEMPTING TO REPLACE TROLLEY BY BEING STRUCK BY FOLLOWING CAR.—In the case of *Simmons v. Southern Traction Co.*, 207 Pa. St. 589, 57 Atl. 45, the plaintiff was employed as a conductor on one of the defendant's railways, and while attempting to replace the trolley which had slipped from the feed wire, he was struck and injured by a following car. The railway where the accident occurred was single track. It was contended by the plaintiff that proper appliances had not been furnished. In support of this contention the plaintiff offered to

prove that no signal box or other appliance was placed at the end of the double track to warn motormen that the single track upon which the plaintiff's car had stopped was occupied; that such signal boxes or other appliances were in general use and were necessary to avoid accidents where cars were operated upon such single tracks without a schedule. The car being operated by the plaintiff was an extra and was not run upon any schedule time. It was held that such testimony was properly excluded; that whatever danger there was in the use of the single track without signals was obvious and as fully known to the plaintiff before as after the accident, and the risk was voluntarily assumed by him.¹

The plaintiff was nonsuited, and upon appeal the judgment for the defendant was affirmed.

- 2. TAXATION; EXEMPTION OF POWER-HOUSE FOR MANUFACTURE OF ELECTRICITY UNDER GENERAL STATUTE RELATING TO TAXATION OF RAILROAD PROPERTY FOR MUNICIPAL PURPOSES.**—In the case of *City of Philadelphia v. Electric Traction Co.*, 208 Pa. St. 157, 57 Atl. 354, the question arose as to whether under the Act of April 21, 1858 (P. L. 358), providing that "the offices, depots, carhouses, and other real property of railway corporations situate in said city, the superstructure of the road and water stations alone excepted, are and hereafter shall be subject to taxation by ordinances for city purposes," a power-house, for the manufacture of electricity, owned and used by a traction motor company engaged in the operation of street railways should be placed in the class of property taxable, or in the class exempted. The court held that a power-house maintained for such purposes was within the exemption specified in the act. In this connection the court said: "A distinction had been made by this court between the class of property that was a constituent part of a corporate franchise, and essential to the performance of its duties to the public, and that which was only advantageous and convenient, but not necessary to the exercise of its franchise. The Act of 1858 was written in the light of these decisions, and it followed them; preserving the distinction that had been made, but drawing the lines more closely against exemption. Up to this time the offices, depots, carhouses, the superstructure of the road, and water stations of a railroad, had all been exempt. The act drew the line at a different place, and exempted only the last two, which were clearly essentials, and formed part of the road itself. The act does not make an arbitrary selection of property to be taxed and property to be exempted, but makes a classification on the same principle as that which had been established by decision, but on slightly different lines. Under this classification, the property of a public corporation in Philadelphia that is essential to its franchise is exempt, unless named in the act as subject to taxation, or coming within the same class, as depots, offices, and car barns. There can be no doubt as to the class to which the power-house of an electric

1. See *Nelson v. Oil City St. Ry. Co.*, *ante*, p. 860.

motor company belongs. As a means of furnishing motive power, it is as essential to the company as is a water station to a railroad company. It does not take the place of anything before taxable, but is a substitute for that which was before expressly exempted, and it comes within the stringent rule of necessity established by the Act of 1858 in exempting the roadway and means of supplying power."

The judgment is reversed, with a *procedendo*.

3. INJURY TO PASSENGER ALIGHTING FROM RUNNING-BOARD ON OPEN CAR; STEPPING OFF BACKWARDS.—In the case of *Scanlon v. Philadelphia Rapid Transit Co.*, 208 Pa. St. 195, 57 Atl. 521, it appeared that the plaintiff was a passenger upon an open car of the defendant, having a running-board extending along the side by means of which the passengers stepped on and off. She informed the conductor that she wished to get off at a certain street. The car stopped before it reached the street, and the plaintiff, thinking the conductor had stopped the car to let her off, stepped down on the running-board, and attempted to step off backwards from there to the ground. The track was laid at that point near the side of the road, which sloped considerably toward the gutter. She found the distance too great for her to touch the ground comfortably with her foot immediately under the running-board, and, whether from confusion or inability to control herself, the result was that she fell. The court held that the defendant was entitled to binding instructions in its favor, alleging that there was no evidence of negligence, and even if there was, the plaintiff was guilty of contributory negligence. The court, in discussing the facts in the case and the law relating thereto, used the following language: "The question as to whether or not the evidence tends to prove negligence in any case is always for the court. Upon it rests the responsibility of determining whether, under all the evidence, reasonably viewed, the jury may properly find the fact of negligence to exist. The problem may be difficult, but it is not upon that account any less the duty of the court to solve it. It is the function of the court to determine the limits within which the evidence must come in order that the conclusion of negligence may be permissible. Giving to the plaintiff the right to the most favorable view of the facts that may reasonably be taken of them, the court should, upon proper request being made, declare, whether or not, under the submitted testimony, the conclusion of negligence can be reached by the jury. In the present case we are unable to agree with the view taken by the trial judge. Our examination of the testimony impels us to the conclusion that the question involved was one for the court, and not for the jury. The car was running upon the public highway, over which, it must be remembered, the defendant company has no control. In laying its tracks it must conform to the established grade. It can neither construct nor alter any of the places at which passengers are to step on or off its cars. It is obliged to place its tracks and run its cars where the public authorities direct. The contour of the surface of the street and the sides and gutters are all fixed by the

municipal authorities. Passengers leaving the cars must step upon the surface of the street in the condition in which it is placed by the city, which fixes and maintains the grades. Obviously, the rules which might well and reasonably apply to steam railroads owning their own right of way, and having complete control of the approaches thereto, cannot reasonably be applied to street railways, which have not the right of eminent domain, and are only allowed the use of the public highways in common with other vehicles. It may be that in this case the conductor misunderstood the signal of the plaintiff, and stopped the car sooner than she wished; but, if so, she had only to signify that fact, and retain her seat, and be carried to the desired spot. She was under no compulsion, nor did she receive even a suggestion from the conductor, as to where she should get off. That was a matter solely for herself. But the stopping of the car had nothing whatever to do with the cause of the accident. That resulted entirely from the manner in which she left the car. The fact that the street sloped off at the side upon a descending grade to the gutter necessitated a very long step for any passenger attempting to get off in that vicinity. But this fact was perfectly obvious to the plaintiff, if she used her eyes, which she was certainly bound to do. She was leaving the car in broad daylight, and she was apparently able-bodied, and in the full possession of her faculties, and there was no reason for the conductor to interfere with her desire to leave the car at that particular time and place. Had she been misled or misdirected by him in any way, or had darkness prevailed, so that she could not see where she was going, the case would have been stronger; but under the circumstances, whatever difficulty existed in stepping from the running-board to the ground while the car was standing still was open and apparent to her. She had only to look directly to the ground beneath and in front of her when she stood upon the running-board, before stepping from it. The situation was entirely open to her view, and, if she had apprehended any danger whatever from the attempt to step down upon that side, and felt the necessity of leaving the car at that point, it would have been an easy matter for her to step to the other side of the car, and request the conductor to remove the chain, or pass out underneath it. Presumably she saw exactly where she was to step. There was no occasion for her to take the step unless she thought it perfectly safe for her to do so. No confusion prevailed. The occasion called for no haste. The car was standing perfectly still, and so remained until after she left it. It is true that the highest courtesy upon the part of the conductor would have impelled him to step off the car and assist a lady to alight who desired to leave the car at a point which involved the taking of an unusually long step, but we cannot say that he was under any legal obligation to do so. We know of no rule which requires the conductor of a street car to supervise every motion of a passenger stepping from a stationary car to the ground. We think he may assume that under such circumstances, in broad daylight, with everything open to view, the pas-

senger, even though a woman, may be allowed to judge for herself the distance she can safely step. The court which tried this case below tried the case of *Bland v. Roxborough, etc., Ry. Co.*, 13 Pa. Super. Ct. 23, in which the facts were very much like those now under consideration, although making more strongly against the defendant. The court there directed the jury to find a verdict for the defendant, and the judgment was affirmed in an opinion by the Superior Court. The ruling in that case is, in its principle, controlling of the present one, and should have been followed."

McCauley v. Rhode Island Co.

(Rhode Island — Supreme Court.)

INJURY TO PASSENGER BY SUDDEN STOPPING OF CAR; ALLEGATION OF PROXIMATE CAUSE.—An allegation in the plaintiff's complaint that the defendant by careless, negligent, sudden, and unusual stopping of the car resulting in the repulsion of a fellow passenger violently against the plaintiff to her injury, is a sufficient allegation of the proximate cause of the plaintiff's injury. It is not necessary for her to set out the proximate cause of the stopping of the car. An allegation in the complaint that one of the passengers riding upon said car, who was obliged to stand by reason of the seats of said car being occupied, was necessarily, by reason of said carelessness and negligence, thrown against the plaintiff with great force and violence, causing the plaintiff's injury, sufficiently negatives that such throwing of the passenger was the result of any independent or intervening action of his own.

DEMURRES to plaintiff's declaration. Decided January 22, 1904. Reported (R. I.) 57 Atl. 376.

Comstock & Gardner, for plaintiff.

Henry W. Hayes, Frank T. Easton, and Lefferts S. Hoffman, for defendant.

Opinion by DUBOIS, J.

The first count of the plaintiff's declaration, to which the defendant has demurred, alleges "that the plaintiff, to wit, on said 16th day of December, A. D. 1902, at the special instance and request of the said defendant, took passage at a point on Weybosset street, in said Providence, on one of the defendant's box

cars, so called, running in the direction of said Wanskuck, and was obliged, by reason of the seats and aisle of said car being occupied by passengers, to take a standing position in the aisle of said car, near its door; and while she was riding as a passenger in said car, and while in the exercise of due care, and as said car was proceeding in a northerly direction upon and along North Main street, a public highway of said Providence, and was ascending Constitution Hill, so called, under the care, control, and management of the defendant, its agents and servants, on the day and year aforesaid, said defendant, its agents and servants, carelessly and negligently permitted said car upon which said plaintiff was riding as a passenger, while said car was climbing said hill, to come to a sudden and unusual stop, so that one of the passengers riding upon said car, who was obliged to stand by reason of the seats of said car being occupied, was necessarily, by reason of said carelessness and negligence, thrown against said plaintiff with great force and violence, whereby the plaintiff was greatly hurt," etc. The defendant bases its demurrer upon the two following grounds: "(1) That it does not appear in and by said first count what was the proximate cause of the accident whereby one of the passengers riding on said car was thrown violently against the plaintiff; (2) that it does not appear in and by said count that said passenger thrown violently against the plaintiff as aforesaid was free from negligence."

It is necessary for the plaintiff to set out aptly in her declaration the proximate cause of her injury; and this she has done, by alleging the careless, negligent, sudden, and unusual stopping of the car upon the hillside, resulting in the propulsion of a fellow passenger violently against her, to her injury. It is not necessary for her to set out the proximate cause of the stopping of the car more fully than she has done. It does appear from the said first count of the declaration that a passenger was necessarily thrown, by the carelessness and negligence of the defendant, its agents and servants, against the plaintiff. A fair construction of the allegation is that such throwing was the inevitable result of the defendant's conduct or misconduct, and sufficiently negatives any inference that such throwing of the passenger was the result of any independent or intervening action of his own. Even though it should be claimed that the throwing of such passenger

against the plaintiff was a concurring cause of her injury, such question cannot be determined on demurrer for we have heretofore held that the question of concurring causes is a question for the jury, under proper instructions, unless it clearly appears from the declaration that the proximate cause of the injury was the plaintiff's carelessness. *Yeaw v. Williams*, 15 R. I. 20, 23 Atl. 33; *Willis v. Providence Telegram Co.*, 20 R. I. 285, 38 Atl. 947. While it is true that the causal connection between negligence and damage must continue unbroken, in order for the plaintiff to recover, and that such causal connection may be broken by the interposition of independent responsible human action — *Mahogany v. Ward*, 16 R. I. 479, 17 Atl. 860, 27 Am. St. Rep. 753 — there is nothing in the declaration at all suggestive of such state of facts. On the contrary, it appears that all the occupants of the car must have been affected, in different degrees, according to their respective positions and surroundings, by the sudden cessation of its progress; and, nothing appearing to the contrary, we may assume that they were average specimens of ordinarily sane humanity, conducting themselves with a reasonable degree of propriety.

Demurrer overruled, and case remanded to the Common Pleas Division for further proceedings.

South Bound Railroad Co. v. Burton.

(South Carolina — Supreme Court.)

1. **USE OF CITY STREETS BY STREET RAILWAY; RIGHTS OF ABUTTING OWNER.**— Notwithstanding a statute under which a city was created, providing that the lands devoted to street purposes shall be held by the city for the use of the State, and an ordinance adopted by the city council authorizing the use of such streets by a street railway company, under authority of a legislative act, abutting owners are entitled to compensation for the depreciation in the value of their property by a use of such streets for street railway purposes.¹

1. As to rights of abutting owners where city streets are used for street railway purposes, see note, 1 St. Ry. Rep. 311. As to the determination of damages to abutting owners for the taking of streets by street railway com-

- 2. ASSESSMENT OF DAMAGES.**—Abutting owners are only entitled to damages for the substantial depreciation of the value of their abutting lots. The measure of the assessment is the decline in the value of the property consequent upon the use of the street by the railroad.

APPEAL by plaintiff from decrees for the defendants. Decided November 23, 1903. Reported 67 S. C. 515, 46 S. E. 340.

Eight separate actions were brought by the plaintiff against Eliza Burton, Maria L. Taylor, Mary E. Higbee, Margaret Day, Emma L. Pierce, John N. Finley, Aaron Greer, and Martha Holmes.

Wm. H. Lyles and *D. W. Robinson*, for appellant.

Melton & Belser and *P. H. Nelson*, for respondents Taylor, Higbee, Day, Pierce, Finley, and Greer.

R. W. Shand, for respondent Burton.

J. T. Seibels, for respondent Holmes.

Opinion by Woods, J.

The South Bound Railway Company brought these separate actions against the several defendants to enjoin them from prosecuting statutory proceedings instituted to obtain compensation for depreciation of their property in the city of Columbia, resulting from the construction and operation of the plaintiff's railroad through Lincoln street. All of the lots abut on Lincoln street, except lot No. 2 of the defendants, Eliza Burton and her cotenants, which is contiguous to their lot No. 1 on that street. The circuit judge, upon trial of the case, dissolved the temporary injunctions, holding that all the defendants were entitled to have their damages assessed under the condemnation statute. The Act of 1786 (4 Stats. at Large, p. 751), under which the city of Columbia was

panies, see note, 1 St. Ry. Rep. 714. As to the right of a street railway company to condemn the fee of abutting owners in streets, see *Schenectady Ry. Co. v. Peck*, 2 St. Ry. Rep. 806, 88 App. Div. (N. Y.) 201, 84 N. Y. Supp. 759. As to the right of lessees of abutting owners to recover damages, see *Child v. N. Y. Elev. R. Co.*, 2 St. Ry. Rep. 806, 89 App. Div. (N. Y.) 598, 85 N. Y. Supp. 604. As to rights of abutting owners where fee of street is owned by them, see *Paige v. Schenectady Ry. Co.*, 2 St. Ry. Rep. 768, 178 N. Y. 102, 70 N. E. 213.

founded, provided that the land acquired by the commissioners for that purpose should be held by them "for the use of this State," but it directs them to lay off lots and streets of prescribed dimensions. In 1871 the Legislature empowered the city council to "lay out new streets, close up, widen or otherwise alter those now in use," subject to the constitutional prohibition against taking private property without compensation, and the statutory provisions as to the method of acquiring property for street purposes and assessing damages. Under this authority the city council, on September 26, 1899, authorized the South Bound Railroad Company to build its road through Lincoln street.

The appellant takes the position that the State, under the Act of 1786, remains the absolute owner of all streets of the city, that abutting owners can acquire no rights therein against it, and, since it enjoins the city council to close up or alter the streets, the authorization by the council to use Lincoln street was equivalent to direct authority to the railroad from the State. We incline to think the appellant's view is correct, that the rights acquired by the State in the lands upon which the city of Columbia was laid off are similar to those of the United States in the lands upon which the national capital is built. In both instances the streets were laid off under public authority, and commissioners directed to sell lots with reference to those streets; and under such circumstances the public faith is pledged not to destroy or materially interfere with the street privilege, which it created as an inducement to purchasers. This principle was not involved in *Van Ness v. Mayor*, 4 Pet. 232, 7 L. Ed. 842, or *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 3 Sup. Ct. 445, 27 L. Ed. 1070, relied on by appellant. Conveyance to the purchaser of lots abutting on a street carries with it the property rights to the reasonable use of the street, of which he cannot be deprived for even a public purpose without compensation. *Hot Springs R. Co. v. Williamson*, 34 L. Ed. 355, note; *Railroad Co. v. Applegate* (Ky.), 33 Am. Dec. 497; *Haynes v. Thomas*, 7 Ind. 43; *Lewis Eminent Domain*, § 114. But whatever may be the rights of the State in this regard, it is clear that the Legislature did not by the Act of 1871 intend to confer on the city council the absolute power over the streets which appellant attributes to the State. Fair interpretation of the act leads to the con-

clusion that it only gives such control of streets as is usually exercised by such officers, which is subject to the constitutional burden of making compensation for the taking of private property. It may be true that, where the State by charter authorizes the construction of a railroad on a definite line, the right is implied to enter and cross the land of the State on that line; but this implication does not extend to the destruction or impairment of private property rights which others have acquired with respect to such land in consequence of an antecedent contract with the State. It is manifest, therefore, the respondents having acquired property rights in Lincoln street by reason of the State's sale of the abutting lots to their grantors, with an implied contract that the purchasers should have the usual benefits and privileges of abutting owners, the State could not, though the owner of the street, authorize the taking away of such benefits and privileges without compensation.

The vital question, therefore, is whether the construction of a railroad through Lincoln street is such curtailment of the usual street privileges as entitles an owner of abutting lots to compensation for the depreciation in value of his property arising from the railroad use. It is insisted such depreciation does not amount to taking property, but only damaging it, and hence cannot form the basis of a proceeding under our Constitution and statute, which only provide compensation for "taking." It is not to be doubted, as said in *Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336, "The State, and the city council as its agents, had full power over the highways of the city to improve them for the uses for which they were made highways." Those who purchase city lots, in the absence of statutory protection, take them subject to the exercise of the discretion of the city authorities to improve the streets for the uses for which they were made highways. It is true, in *Garraux v. Greenville*, 53 S. C. 577, 31 S. E. 597, the court said: "The great weight of authority is to the effect that a change in the grade of a street which diminishes the value of the adjacent property is not a taking of property, within the constitutional provision above quoted." Similar expressions are used in *Water Co. v. Greenville*, 53 S. C. 89, 30 S. E. 699. These are correct statements of the law applicable to those cases, both of which involved claims for damages arising from a change of grade made

in improving a street; for the claimants there held their property subject to the right of the city council to improve the street by changing the grade, and hence such alteration could not involve the taking of a property right, for none existed as against the discretion of the council to change and improve the street. 2 Dill. Mun. Corp., § 990. The depreciation of value produced by building an ordinary railroad through a street presents a very different question. The operation of a railroad running to distant points is not a street purpose. It is not ordinarily used to transport either freight or passengers from one part of a city to another, and has no direct connection with a city's internal traffic or travel, which are the distinctive uses of its streets. Hence the building and operation of a railroad through a street cannot be regarded such a street use as to require the abutting landowner to submit to the total or partial obstruction of the value of his property without compensation. Causing such depreciation is clearly destroying or taking property. Property is not only ownership of particular lands or chattels, but it embraces the value they have by reason of their legal relations to all other things. All rights in a street which the residents of a city have in common are administered, under legislative authority, by the city council as trustees for all its citizens, and hence the council's consent to the use of the street by the railroad company is binding on the city at large (*Cherry v. Rock Hill*, 48 S. C. 560, 26 S. E. 798); but an abutting landowner has a special property in the benefits derived from the street on which his land is situated, by reason of its relation to the street, which differs in kind and degree from the interest of the municipal public, and the destruction or any impairment of these benefits for other than street purposes, which materially lessen its value, is taking private property. This view seems clearly correct in principle, and we think it is supported by the great weight of authority even in those States where, as in this State, the constitutional and statute law do not provide for compensation for damage to property when taken for a public purpose. *Wilkins v. Gaffney*, 54 S. C. 199, 32 S. E. 299; *Abendroth v. Railroad Co.* (N. Y.), 25 N. E. 496, 11 L. R. A. 634, 19 Am. St. Rep. 461; *Story v. Railroad Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *White v. Railroad Co.* (N. C.), 18 S. E. 330, 22 L. R. A. 627, 37 Am. St. Rep. 639; *Railroad Co. v. Steiner*,

44 Ga. 546; Elliott Roads and Streets, 528; 1 Lewis Eminent Domain, 240. As was intimated in *Ross v. Railway Co.*, 33 S. C. 483, 12 S. E. 101, and *Leitzsey v. Water Power Co.*, 47 S. C. 464, 25 S. E. 744, 34 L. R. A. 215, it would be a very narrow and technical construction not to hold that the term "lands," used in the condemnation statute, embraces "all rights and easements growing thereout." The case of *McLaughlin v. Railway Co.*, 5 Rich. Law, 596, was decided under constitutional and statute law essentially different from those now in force; but even if this was not the case, we should be forced to overrule it on this point on principle as well as under the authorities above cited.

The great majority of the older authorities sustain appellant's view that the doctrine above stated applies only where the owner of the abutting property also owns the fee in the street, but not where he has only an easement, the fee being in the State or the city. A careful collation of the cases supporting this position is found in 2 Dill. Mun. Corp., § 702, note. But this doctrine is not completely overturned. 2 Dill. Mun. Corp., §§ 704, 723c; *Story v. Railroad Co.*, *supra*; *Lahr v. Railroad Co.*, 104 N. Y. 268, 10 N. E. 528; *White v. Railroad Co.*, *supra*; *Theobald v. Railway Co.* (Miss.), 6 So. 230, 4 L. R. A. 735, 14 Am. St. Rep. 564; *McQuaid v. Railway Co.* (Oreg.), 22 Pac. 899; *Kaufman v. Railroad Co.* (Wash.), 40 Pac. 137; *Adams v. Railroad Co.* (Minn.), 39 N. W. 629, 1 L. R. A. 493, 12 Am. St. Rep. 644. It is difficult to imagine a right more empty and theoretical than private ownership of the fee in the street of an established city. The possibility of regaining possession of the property by abandonment of the street is so remote that it may ordinarily be regarded a negligible factor. The adjacent owner has no present beneficial use differing in the slightest degree from that which is acquired by a purchaser, for himself and his assigns, who buys a lot abutting on a street laid out by the State or the city on its own land. In the one case in his dedication he retains, and in the other, by the State's or the city's dedication, he acquires, certain street privileges which constitute property.

But it is not the mere laying of a railroad track and the operation of a railroad in a street that would entitle abutting land-owners to compensation, when, as in these cases, they have not the fee in the street, and have, therefore, not even a technical interest

in it beyond the right to use it for street purposes. Hence it is only the substantial depreciation of the value of the abutting lots that can be assessed in their favor, and the measure of the assessment is the decline in the value of the property consequent upon the use of the street by the railroad. The difference in value should be substantial, and not fanciful or conjectural, for the advance of society imports increased friction among its members; and, if the law sanctioned the holding up for compensation of public and private enterprises on account of mere inconvenience or annoyance, it would impede rather than promote the public welfare. We shall not attempt to add anything to the very clear statement of the law on this subject made by Mr. Justice Jones in *Allen v. Union Oil Co.*, 59 S. C. 578, 38 S. E. 274. It is there held that there must be some substantial physical injury to the real estate, not merely discomfort, inconvenience, or bodily injury to the person of the owner. The jarring of the building, noise, smoke, vapors, loss of light and air, increased risk of fire from sparks, material interference with ingress and egress, set forth in each of the answers, are all items which may enter into the estimate, but only so far as they depreciate the value of the lots. *Bowen v. Railroad Co.*, 17 S. C. 579; *Board of Trade v. Darst*, 85 Am. St. Rep. 309, note; *Egerer v. Railroad Co.* (N. Y.), 14 L. R. A. 381, note; *Case v. Minot* (Mass.), 22 L. R. A. 543, note. The loss of light and air cannot be excluded from consideration, as appellant contends, under the authority of *Bailey v. Grey*, 53 S. C. 515, 31 S. E. 354, and *Napier v. Bullwinkle*, 5 Rich. 301, for these cases only hold that the right to light and air cannot be acquired by prescription, and do not touch this question. The case of *Manson v. Railroad Co.*, 64 S. C. 121, 41 S. E. 832, does not apply, because in that case the court held those claiming damages had no legal interest in Sydney Park, near which their lands were situated, differing in kind from that of other residents of the city of Columbia.

We proceed to the consideration of the several cases, in view of the legal conclusion above stated. The jury determines the amount of the assessment; the court can only fix the principles on which it should be made. If the foregoing statement of the law is correct, it will not be denied that the injunction in the case of *Martha Holmes* must be dissolved. Maria L. Taylor, Eliza Burton and

her cotenants, Mary E. Higbee, John N. Finley, and Aaron Greer have corner lots, and hence have access from another street. This fact may lessen the depreciation, but it does not destroy their right to have the loss of value assessed.

It is alleged that Emma L. Pierce, Margaret Day, John N. Finley, Mary E. Higbee, and Eliza Burton and her cotenants have encroached on Lincoln street, and it is contended that, in so far as the injury to the lots of these parties arises from, or is increased by, such encroachment, they can make no claim against the railroad company. The appellant has attacked with great force the conclusion reached by the court in *Crocker v. Collins*, 37 S. C. 334, 15 S. E. 953, 34 Am. Rep. 752: "We think, therefore, that mere adverse possession, for the statutory period, of a street or alley in a town, which is a public highway, cannot confer a title. But where such possession is accompanied with other circumstances which would render it inequitable that the public should assert its rights to regain possession, then, upon the principle of estoppel, a party may be protected against the assertion of right by the public, in order to prevent manifest wrong and injustice. For example, when a party, under an honest conviction of right, has taken possession of a portion of one of the streets or alleys of a town, and expended his money in erecting buildings thereon, without interference on the part of the public, these, or perhaps other circumstances connected with adverse possession for the statutory period, may afford good ground for estoppel." This doctrine has been repudiated by courts of high authority, but it has much to commend it. Certainly the argument against it is not sufficiently strong to warrant the court in overruling the case. We think there is sufficient evidence to sustain the conclusion of the circuit judge that these cases fell within the rule stated in that case. Lot No. 2, of Eliza Burton and her cotenants, does not abut on Lincoln street, and they have not, by virtue of such ownership, any property rights in its street privileges differing from those of the general public. For this reason, the injunction in their case must be made permanent as to this lot. *Cherry v. Rock Hill*, *supra*; *Manson v. Railroad Co.*, *supra*; *Aldrich v. Railroad Co.* (Ill.), 63 N. E. 155, 57 L. R. A. 237.

With the modification indicated above, the judgment of the Circuit Court is affirmed.

Knoxville Traction Co. v. Mullins.

(Tennessee — Supreme Court.)

1. **HORSE FRIGHTENED BY NEGLIGENT OPERATION OF STREET CAR.**¹—The plaintiff's horse, upon which he was riding, became frightened upon hearing the approach of a car upon the tracks of the defendant and threw the plaintiff, causing the injury complained of. There was evidence to the effect that the motorman in the exercise of due diligence could have seen that the plaintiff was in danger because of the fright of his horse, but that he permitted his car to approach at a rapid rate of speed, continually sounding his gong, until the car passed the place where the accident occurred. Under the facts it was held that a verdict for the plaintiff should be sustained. The rule was applied that where it reasonably appears to the motorman in charge of a street car that a horse is so frightened as to be unmanageable, or is otherwise placing the person in charge of the horse in imminent danger, it is the motorman's duty to stop sounding his gong and also to stop the movement of the car, and thus prevent, if it may be, a threatened injury. For a failure to exercise such precaution the street railway company is liable for the resulting injuries.
2. **QUESTION OF NEGLIGENCE OF RIDER FOR THE JURY.**—Whether it was prudent or imprudent for the plaintiff, riding a young and nervous horse, to continue upon the street where cars were continually passing was a question which under the facts of the case should be settled by the jury under proper instructions.

APPEAL by defendant from judgment for plaintiff. Decided October 24, 1903.
Reported (Tenn.) 76 S. W. 890.

Webb, McClung & Baker, for appellant.

Shields & Mountcastle and *Sansom & Welcker*, for appellee.

Opinion by BEARD, C. J.

The defendant in error sued to recover from plaintiff in error damages sustained by him from its alleged negligence in so operating one of its cars as to frighten the horse which he was riding so as to cause it to throw and seriously injure him. The record shows that he was coming into the city of Knoxville on Broad

1. As to liability of street railway company for injuries caused by horses frightened by the negligent operation of street cars, see note to *Lincoln Traction Co. v. Moore*, ante, p. 642.

street, and that as he entered the street the car passed him, going north to its terminus. His horse indicated some degree of fright or nervousness at the approach of the car, but at the moment of its passage a covered wagon intervened between it and the car, and he (defendant in error) had no difficulty in controlling it. After reaching the terminus, the car returned, going south on Broad street, and in the same direction with the defendant in error. The horse, evidently nervous, on hearing the approaching car, turned its head, and, discovering it, began immediately to rear and plunge. At that moment the car was descending a slight grade. There is material evidence to show that the motorman saw, or could have seen if he had been exercising due diligence, when distant from the defendant in error from 80 to 100 yards, that the horse was much frightened, and was putting its rider in imminent peril; and that he permitted his car to approach at a rapid rate of speed, all the while sounding his gong, until the car passed the place where the accident occurred.

Upon this state of facts we think the verdict of the jury is sustained, and the circuit judge cannot be put in error for declining to grant to the defendant below a new trial.

While it is true that street railroads are not liable "for accidents arising from fright to horses caused by the usual operation of its cars if its employees are free from negligence, yet if one in charge of a car sees that a horse is frightened, and injury is imminent, it is his duty to refrain from sounding his gong or to stop the car. To continue to sound it under such circumstances would be such legal misconduct as would render the company liable for resulting injury." *Nellis Street Surface Railroads*, p. 329. It is not to be understood from this that the employee in charge of the moving car on a public thoroughfare is obliged, at the peril of subjecting his employer to a recovery for damages, to stop the usual methods employed in running street cars every time he sees a frightened horse in the street. But we think the safety of those who ride or drive horses along these highways requires an enforcement of the rule that, where it reasonably appears a horse is so frightened as that it is unmanageable, or is otherwise placing the one in charge or others in imminent danger, the motorman should stop sounding his gong or bell, and also stop the movement of his car, and thus prevent, if it may be, a threatened in-

jury. To continue to run his car at a rapid rate upon the frightened animal, and to ring his gong or bell, are acts of wantonness, which should make the master liable for the injuries that result therefrom. *Philadelphia Tract. Co. v. Lightcap*, 61 Fed. 762, 10 C. C. A. 46; *Benjamin v. Holyoke R. Co.*, 160 Mass. 3, 35 N. E. 95, 39 Am. St. Rep. 446; *Ellis v. Lynn & B. R. Co.*, 160 Mass. 341, 35 N. E. 1127.

In his instructions to the jury the circuit judge clearly announced the rules of law affecting the rights and liabilities of the respective parties, and especially said to the jury that the plaintiff could not recover unless he, at the time of the injury, was in the exercise of due care. As an additional safeguard to the plaintiff in error, he granted a number of requests that were submitted by its counsel. These requests were as follows:

First. "The right of a company to construct and operate its road along the streets carries with it the right to do whatever is necessary to the successful operation of the road, so that the company is not liable for injuries caused by horses becoming frightened, unless it can be shown that the fright was caused by some unusual sight or sound, and that this unusual sight or sound was caused by the company's negligence." Second. "A man riding a horse along a street upon which a street car runs is presumed to be able to manage and control it, and the mere fact that the horse, when at such distance from the track as to avoid a collision, becomes frightened, places the company under no duty to him until it is evident that the rider has lost control of and cannot manage his horse." Third. "The motorman of a car is not, as a matter of law, bound to check or stop his car merely because the horse becomes frightened at the appearance and noise of the cars; and the company would not be liable for its failure to check or stop it unless the circumstances were such as to shew to the motorman that an accident would be unavoidable unless he did check or stop his car."

We think that, if there had been anything lacking in the original charge, it was supplied by these requests, and that in giving them the trial judge went to the extreme limit in laying down rules for the protection of the plaintiff in error. But it is insisted that he was in error in declining to give the fourth and seventh of the special requests submitted to him. The fourth is in these words:

"If you shall find that when this horse became frightened the motorman checked the speed of the car, and ran up making no more noise than usual or necessary, and that after the front of the car came up even with, or passed, the horse, which was at a safe distance from the track, it became unmanageable, and threw and hurt the rider, then the company would not be liable."

We think there was no error in declining to give this request. The effect of this request, if given, would have been to say to the jury that, though the horse was frightened, yet the traction company would be excused from liability if the motorman checked the speed of his car, and continued to run with only the usual and necessary noise, when under the law it was the part of due care and caution, when the horse became frightened, if necessary to calm and save the rider, to entirely stop the car, without regard to the point which the car had reached at the time. The seventh request, which was declined, is as follows: "If you shall find from the evidence that Don Mullins was riding a young and skittish horse, and that he met this car just at the end of the line, and his horse showed fright at the car, then I charge you it was his duty to turn off the street on which the car was running, and upon which it had to pass along upon its return to town, if there were cross-streets upon which he might have turned, and avoided the car on its return; and, if he failed to do so, then it was negligence." We think this request was properly declined. It ignores the fact that Mullins was a stranger in the town, and might have had no knowledge of any cross-street into which he might have turned for safety, as well as the fact that all fright exhibited by the horse upon first meeting the car might have been so small and immaterial as not to have suggested to a man of ordinary prudence that it would be unsafe for him to continue upon a street traveled by the cars. Whether it was prudent or imprudent for Mullins, riding a young and skittish horse, was a question which, under all the facts of the case, was to be settled by the jury under proper instructions, and the effect of this request would have been to take that question away from the jury, and determine it as a matter of law upon the two facts stated hypothetically in it.

We think there was no error committed in the trial of this cause, and the judgment of the lower court is affirmed.

Knoxville Traction Co. v. McMillan.

(Tennessee — Supreme Court.)

PRIVILEGE TAX ON STREET CAR ADVERTISING; CONSTITUTIONALITY.—The provisions of a statute (Tenn. Acts of 1903, chap. 257), imposing a privilege tax upon companies engaged in the business of advertising in street cars, and making the street railway company liable for the payment of the tax is unconstitutional in so far as it requires the payment of the tax by the street railway company, because it deprives the company of its property without hearing or due process of law.

APPEAL by complainant from a dismissal of its bill. Decided November 20, 1903. Reported (Tenn.) 77 S. W. 665.

Shields & Mountcastle, for appellant.

Charles T. Cates, Jr., Attorney-General, and *Reuben L. Cates*, for appellee.

Opinion by SHIELDS, J.

This suit involves the constitutionality of the provision of chapter 257, p. 599, of the Acts of 1903, the General Revenue Law enacted by the present General Assembly, making street and commercial railroad companies liable for the privilege tax imposed upon advertising companies conducting the business of advertising in the cars and stations of such companies.

The portions of the statute in question, and necessary to show the connection, are these:

"That each vocation, occupation, and business hereinafter named in this section is hereby declared to be a privilege; and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the county court clerk, as provided by law for the collection of revenue.

"All persons, companies, or corporations owning, controlling, or conducting the business of advertising in street cars in counties of 60,000 inhabitants or over, each, per annum.....	\$100 00
"All persons, companies, or corporations owning, controlling, or conducting the business of advertising in dummy cars or railroad cars in counties of 50,000 inhabitants or over, each, per annum.	50 00
"All persons, companies, or corporations owning, controlling, or conducting the business of advertising in railroad depots in each county in which business is done, each, per annum	10 00

"Provided that the street car company or railroad company who leases or sells such advertising privileges shall be liable for the payment of the above privileges."

The complainant, a street railway company, owning and controlling a street railway in Knox county, leased the exclusive privilege of advertising in its cars to the Consolidated Railway Advertising Company for a term of years, for a fixed rental, to be paid at stated intervals; and the latter company has been, and is now, exercising this privilege, and liable for the tax.

The defendant, John E. McMillan, clerk of the County Court of Knox county, demanded of complainant payment of the privilege tax due from the Consolidated Railway Advertising Company, and, upon complainant's refusing payment, issued a distress warrant against complainant therefor, which was about to be levied upon its property, when it paid the tax under protest, and now brings this suit to recover the same; insisting that the provision of the statute making it liable for said tax deprives it of its property without due process of law, and consequently contravenes article 1, section 8, of the Constitution of Tennessee, providing that no man shall be taken or imprisoned or dissesied of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land, and also the Fourteenth Amendment of the Constitution of the United States, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law, and is, therefore, void.

These contentions are sound, and must be sustained.

The traction company and the advertising company are distinct and independent corporations, owing each other no duty or obligation, and having no interest in common. The former is engaged solely in operating a street railway, and the latter in the advertising business. The tax is imposed upon the business of advertising in street cars — a privilege exercised by the advertising company, and not by the traction company. It is not a liability of the traction company, but one of the advertising company. The only relation of the two companies is that the former is the creditor of the latter for the rent due it for the use of its cars for advertising purposes. The statute arbitrarily imposes upon the traction

company liability for this debt of the advertising company, and requires it to pay it with its own means. This is a deprivation of property without a hearing or due process of law, clearly within the prohibition of the constitutional provisions relied upon. This is too obvious for argument, and the property of one citizen can no more be taken to pay a tax or public debt due from another than the private debt of such other person.

The cases of *First Nat. Bank v. Commonwealth*, 9 Wall. 353, 19 L. Ed. 701; *Bells Gap R. Co. v. Pennsylvania*, 134 U. S. 239, 10 Sup. Ct. 533, 33 L. Ed. 892, and *First Nat. Bank v. Chehalis Co.*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069, in which statutes requiring corporations to pay taxes due from bondholders and shareholders are held valid, are cited and relied upon to sustain this statute. They are not in point. These statutes apply to corporations having assets of their bondholders and shareholders, in the way of interest and dividends, in their hands, which they can apply to the payment of the taxes, and it is upon this ground that they are sustained.

This is made clear in the case of *Stapylton v. Thaggard* (decided by the Circuit Court of Appeals of the United States), 91 Fed. 93-95, 33 O. C. A. 353, where a recovery against the receiver of an insolvent bank on account of the taxes assessed against the shareholders was denied because the receiver did not have funds due them in his hands.

It is there said:

"As we construe the cases, from *First Nat. Bank v. Commonwealth*, 9 Wall. 353, 19 L. Ed. 701, to *First Nat. Bank v. Chehalis Co.*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069, the bank is made to pay the taxes assessed by the State against its shareholders, when the State statutes lay such duty upon the bank, upon the theory that the shares are valuable, and that the bank has assets in its hands belonging to the shareholders from which it can recoup. Where a bank is insolvent and has passed into the hands of a receiver, the shares are generally worse than worthless, and the receiver has no assets belonging to the shareholders which can be applied to the payment of taxes assessed on shares. In such case, we are of opinion that the tax assessed against the shares of the bank cannot be collected from the receiver, or from assets in his hands."

The complainant is not the debtor of the advertising company, and at no time, in due course of business, will have any of its assets in its hands or under its control, which it can apply to the

payment of the tax imposed upon it. If required to pay this tax, it must do so out of its own property, without any provision for its reimbursement.

The provision of the statute requiring these companies to pay the tax imposed upon advertising companies is, therefore, clearly unconstitutional and void, and complainant is entitled to recover from the defendant the taxes which it has been unlawfully required to pay.

The decree of the chancellor dismissing complainant's bill will be reversed, and a decree here rendered in accordance with this opinion.

Nashville Railroad Co. v. Howard.

(Tennessee — Supreme Court.)

1. INJURY TO PASSENGER BY BEING THROWN FROM SEAT BY SUDDEN JOLT;¹
EVIDENCE.—The plaintiff, a child of four years of age, was a passenger on one of the defendant's cars. He was seated at the end of a seat holding the guard-rail with his right hand. He was near and readily accessible to his mother and sister who accompanied him. As a result of a sudden jolt of the car the child was thrown from his seat to the track and seriously injured. There was evidence tending to show that the sudden jolt was due to a defective frog in the track. Testimony was introduced to the effect that prior to the accident cars had been derailed at the point where the accident occurred and witnesses were permitted to testify that there were times prior to the accident when they would themselves have been thrown from the car at this point if they had not been holding on. It was held that such testimony was admissible as tending to show that the condition of the track was the same as at the time when the accident occurred.
2. CONTRIBUTORY NEGLIGENCE OF CHILD; NEGLIGENCE OF MOTHER IMPUTED TO CHILD.²—In the absence of proof of heedlessness on the part of the plaintiff and negligence on the part of the mother in failing to prevent the incautious acts of the plaintiff there is no basis for imputing to the child any negligence on the part of the mother proximately contributing

1. As to liability of street railway company for passengers injured by sudden jerk or jolt of car, see *Ilges v. St. Louis Transit Co.*, *ante*, p. 586.

2. As to negligence of parents imputed to children injured by negligent operation of street cars, see note to *United Rys., etc., Co. v. Biedler*, *ante*, p. 391.

to the plaintiff's injury; it was, therefore, held that a refusal to charge that if the negligence of the mother proximately contributed in any degree to produce the injury, the defendant company would not be liable, was not erroneous.

APPEAL by defendant from judgment for plaintiff. Decided February 2, 1904.
Reported (Tenn.) 78 S. W. 1098.

J. M. Anderson, for appellant.

Washington, Allen & Roins, for appellee.

Opinion by McALISTER, J.

W. A. Howard, as next friend to his minor son, E. M. Howard, recovered a verdict and judgment in the Circuit Court of Davidson county against the defendant railroad company for the sum of five thousand dollars (\$5,000) as damages for injuries to the son. The company appealed, and has assigned errors.

The cause of action, as outlined in the declaration, is that the plaintiff, a minor, four years of age, took passage with his mother and sister on one of defendant's cars, for the purpose of returning to his home in North-east Nashville; that at the intersection of Meridian and Foster streets, by reason of the defective rails and switchboard or frog, and the track thereunder, as well as the careless and negligent handling of the car by the motorman, a sudden jerk or jolt was caused, throwing plaintiff from his seat violently to the ground, and so mangling and crushing one of his legs that its amputation was necessary.

The facts are that on the 21st of November, 1900, the plaintiff, in company with his mother and sister, boarded an open Meridian street car on the public square, occupying the second seat from the front, the child being seated between his mother and sister. When the car reached the bridge, the child, indulging a natural instinct to view the river, moved across to the seat immediately in front, facing his mother, and with his back to the motorman. The child sat near the end of the seat on the left of the car, and took hold of the guard on the end of the seat with his right hand. In this position he was sitting near and readily accessible to his mother and sister. He remained in this position until he was thrown from his seat to the ground at the intersection of Foster and Meridian streets. When nearing this point the mother rang

the bell for the car to stop in front of her house, but the motor-man, without observing the signal, failed to stop, and continued on around the curve leading to Meridian street, and when the car wheels struck the frog at the point where the curve began, in the language of the conductor, "there was a plunging jerk, like the track going down and the car up." The result of this jerk, as already stated, was to throw the child from his seat to the track, and, before he could be rescued, the wheels ran over his foot and leg. There is evidence tending to show that the sudden plunging jerk and jar of the car was owing to the defective track. The proof of the plaintiff shows that the rails were lower than the frog, and that there were open joints or spaces between the ends of the rails and the frog, and the rails were loose on both sides of the frog, and were not in alignment with the frog rail, so that when the car passed from the rail to the frog, and from the frog to the next rail, it caused a plunging jerk and jar of the car that was both unusual and dangerous. It is further shown that this had been the condition of the track for several months prior to the injury to the defendant in error.

It is conceded by counsel for plaintiff in error there is evidence tending to show that at the place of the accident the track was in a defective, unsafe, and dangerous condition; while the defendant company introduced a number of witnesses who testified that the track was in a safe condition, and the only jolting or jerking of the car was such as was necessarily incident to passing through the frog or switch. It is conceded by counsel that in this conflict of evidence this court would not undertake to disturb the finding of the jury on the facts touching the defective character of the track.

The first assignment of error is that the court below erred in admitting the testimony of the witness Sloan to the effect that previous to the accident he had on several occasions been nearly thrown from the car at the same point. Sloan, it appears, was the conductor on the car at the time of the accident, and had been running as conductor for months prior to that time. He stated that in turning that curve on the occasion of the accident there was a kind of plunging jerk, like the track going down and the car up. The witness further stated there were times when he himself would have been thrown off if he had not been holding.

In this connection will be considered the second assignment of error, in which it is insisted that the court erred in permitting Dr. Frost to testify that previous to this accident he had seen cars derailed at this point, and had helped to put them back on the track, and that this had occurred more than one time.

The third assignment of error is that the court erred in admitting the testimony of A. B. Vaughn to the effect that previous to the accident, while attempting to leave the car at the place of the accident, he came near being thrown off.

These assignments of error raise cognate questions, and will be considered together.

It is insisted that this evidence was improperly admitted, because it adduced collateral facts and issues, which were incapable of affording any reasonable presumption or inference as to the particular fact or matter in dispute.

We find, upon examination of the testimony of these witnesses, that this railroad track had been in this condition for eight or ten months prior to and up to the date of the injury. It is shown that there had been no changes whatever in the condition of the track.

In *Railroad Co. v. Lindswood*, 109 Tenn. 411, 412, 74 S. W. 113, we approved the following rule:

"While in negligence cases the condition of the appliances or premises at the time or place of injury is the material inquiry, evidence of conditions before or after the accident may be received, where it is also shown that the conditions testified to remain unchanged down to the occurrence of the injuries or to the time to which the evidence relates. So evidence is admissible of conditions existing so short a time before or after the accident as, under the circumstances, to warrant an inference of fact that the same conditions existed when the injuries were received."

It is also settled by the weight of authority that evidence of prior injuries to other persons under the same circumstances as those which produced plaintiff's injuries is frequently admitted to show the defendants' actual knowledge of the defective or dangerous conditions or appliances, or as demonstrating the fact that defendants should have anticipated injuries, and were, therefore, negligent. 21 Am. & Eng. Encyc. of Law (2d ed.), p. 519.

It must, of course, in all cases be shown that the conditions at the time of the other accident and the one directly involved in

the litigation were substantially the same. 2 Am. & Eng. Encyc. of Law (2d ed.), 520; *District of Columbia v. Arms*, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618.

The evidence presented herein shows that the condition of the track at the time specified by the witnesses was substantially the same as its condition at the time of the accident. Hence, we think, under the authorities cited, the evidence was clearly competent.

The fifth assignment of error is that the court below erred in refusing the special request of the company as follows:

"If you find from the proof that at the time of the accident the plaintiff, Edgar Meacham Howard, by reason of his tender years, was incapable of exercising ordinary care and prudence for his own protection, and, while a passenger on the car of the defendant, was in the immediate control, care, and custody of his mother, and that the mother, as such custodian of the child, failed on her part to exercise ordinary care and prudence for the child's protection, and that this was the proximate cause of the accident, or contributed to it as its proximate cause, then the plaintiff cannot recover, although the defendant may have been itself guilty of negligence; provided, of course, you find that the defendant's negligence was not willful or intentional."

Counsel aver that, in requesting this charge, he did not invoke the doctrine declared in the case of *Hartfield v. Roper*, 31 Wend. 615, 34 Am. Dec. 273, which has been expressly repudiated by this court in two reported cases — *Whirley v. Whiteman*, 1 Head, 610, and *Bamberger v. Citizens' Street R. Co.*, 95 Tenn. 18, 31 S. W. 163, 28 L. R. A. 486, 49 Am. St. Rep. 909. It was held in these cases that, in an action by a child through its next friend to recover damages for personal injuries, the negligence of its parent or guardian would not be imputed to the child, discarding the doctrine to that effect announced in *Hartfield v. Roper*, *supra*.

It is insisted, however, by counsel for the company, that the only point decided in *Hartfield v. Roper* was that the negligence of the parent in permitting the child to go unattended into a place of danger, or failing to confine it within safe limits, was to be imputed to the child, so as to defeat its action for damages predicated on the negligence of a third person. The distinction is sought to be made in this case that the negligence charged against the mother is not that she let her child go unattended upon the car. It is

admitted that, under such circumstances, the company would have owed to the child a duty commensurate with its inability to care for itself; but it is insisted that, when the mother boarded the car with the child, it was under her immediate care and protection, and as such it was accepted as a passenger; that there was an implied obligation, which the mother assumed, to take care of the child. It is further insisted that the implied obligation of the street railway company was to carry the child, subject to proper care on the part of the mother, and that the negligence sought to be imputed to the child in this case is based on the negligence of the mother in failing to perform the duty which she, on behalf of the child, assumed.

The proposition formulated by counsel is that, in many of the States where the doctrine of *Hartfield v. Roper* has been expressly repudiated, it is nevertheless held that, while the parent's negligence in permitting the child to go into dangerous places unattended cannot be imputed to it, nevertheless where the parent is actually present and personally directing and controlling the action of the child, and the alleged breach of duty to the child arises from a contractual relation assumed by the parent for and on behalf of the child, the child must bear the consequences of the parent's failure to discharge the assumed obligations and duties. Citing *O. & M. Ry. Co. v. Stratton*, 78 Ill. 88; *Toledo & W. Ry. Co. v. Grable*, 28 Ill. 441; *G. H. & H. Ry. Co. v. Moore*, 59 Tex. 64, 46 Am. Rep. 265; *East Saginaw St. Ry. Co. v. Bohn*, 27 Mich. 504; *Pittsburg, etc., Ry. Co. v. Caldwell*, 74 Pa. St. 421; *Stillson v. Hannibal*, 67 Mo. 671; *Waite v. N. E. Ry. Co.*, El. Bl. & El. 719.

The leading English case on this subject is *Waite v. North-eastern Railway Co.*, El. Bl. & El. 719-728. It appeared in that case that a child, five years old, was in charge of its grandmother, who procured tickets for both at a railway station, with the intention of taking the train at that place. In crossing the track, for the purpose of reaching a platform on the opposite side, they were run down by a train, under circumstances of concurrent negligence on the part of the grandmother and the servants of the defendant. The grandmother was killed, and the child sustained personal injuries for which suit was brought. In the Court of

Queen's Bench, Lord Campbell, Chief Justice, held that the infant was so identified with the grandmother that the action could not be maintained. This view was sustained in the Court of Exchequer Chamber. The judges generally based their opinions upon the ground that the action was for a breach of duty arising out of a contract made by the defendant with the person having the infant in charge. Lord Crowder, J., said:

"The case is the same as if the child had been in the mother's arms;" therefore whatever rights the plaintiff had must be predicated upon the contract of conveyance. "The contract of conveyance," said Cockburn, Chief Justice, "is in the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge."

In this case it was the negligence of the person in actual custody of the child at the time of the injury that was imputed to it. The rule of imputed negligence enunciated by the English courts is limited to cases where the parent or guardian is actually present and exercising control over the movements of the child. 2 Thomp. Neg. 1182.

In *East Saginaw Ry. Co. v. Bohn*, 27 Mich. 516, the plaintiff, a child four years old, by being thrown from the platform of a street car, was run over, injuring his left leg in such a manner that amputation was necessary. Suit was brought on behalf of the infant to recover damages sustained by him. It appeared that at the time of the accident the plaintiff was in charge of his twelve and one-half year old brother. The judge charged the jury that the railway company was required to act toward the plaintiff in the situation he then was; that is, considering his age and capacity, and the fact that he was there with a brother of the age named. They were not required to use toward him the same care and skill that might have been required had he been alone. They received him as he was, attended by his older brother, and were required to act toward him just as he was situated; and he further instructed them that if the brother was of an age to have exercised reasonable discretion, and plaintiff was seated where, with the exercise of such discretion in his behalf, he could ride in safety, plaintiff could not recover, unless the injury resulted wholly from the negligence of the company.

Judge Cooley said: "This charge appears to me all the defendant had a right to demand."

In *Stillson v. Hannibal*, 67 Mo. 671, the court said:

"The first question which naturally presents itself, in view of the facts, is whether the responsibility of the defendant in this case is varied from that which is ordinarily exacted from it toward persons of mature years, by reason of the tender years of the plaintiff. There are cases in which it is determined that the same degree of care is not to be expected or required from a person of immature age as would be required of one who had reached years of discretion; and, therefore, that what would be contributory negligence in the one case would not be so considered in the other. The distinction was recognized by this court in *Koons v. Iron Mountain R. Co.*, 65 Mo. 592. These are, however, cases in which the father, guardian, or other protector of the party injured is not present when the injury occurs. In the present case the father and child were together, and it was not simply a permission on his part that his little daughter should cross the railroad at the point she attempted, but the exact place was pointed out to her by her father, and she was proceeding within his view to follow his directions when the injury happened. If, under such circumstances, the father was guilty of negligence, that negligence must be imputable to the child in a suit by the child for damages. As was observed by the Supreme Court of Massachusetts in a similar action (*Holly v. Boston G. L. Co.*, 8 Gray, 132, 69 Am. Dec. 233): 'She was under the care of her father, who had the custody of her person and was responsible for her safety. It was his duty to watch over her, guard her from danger, and provide for her welfare; and it was hers to submit to his government and control. She was entitled to the benefit of his superintendence and protection, and was consequently subject to any disadvantages resulting from the exercise of that parental authority which it was both his right and duty to exert. Any want of ordinary care on his part is attributable to her in the same degree as if she was wholly acting for herself.' In *Waite v. N. E. Ry. Co.*, 96 Eng. C. L. 728, El., Bl. & El. 719, the question was whether, in an action by an infant for injuries caused to him by the negligence of the defendant, it could be set up by way of defense that the negligence of the person in charge of the infant contributed to the accident. The Court of Queen's Bench held that it could, and in this opinion the Court of Exchequer Chamber concurred. Williams, J., said: 'There was here, as it seems to me, from the particular circumstances of the case, an identification of the plaintiff with the grandmother, whose negligence is, therefore, an answer to the action. The person who has charge of the child is identified with the child. If a father drives a carriage, in which his infant child is, in such a way that he incurs an accident, which by the exercise of reasonable care he might have avoided, it would be strange to say that, though himself could not maintain an action, the child could.' In *Ohio & Mississippi R. Co. v. Stratton*, 78 Ill. 88, 3 Cent. L. J. 415, the Supreme Court of Illinois held that the negligence of the parent or guardian having in charge a child

of tender years, where it is the proximate cause of the injury by unnecessarily and imprudently exposing it to danger, prevents any recovery from the carrier corporation. In the present case the inquiry should have been whether the father was guilty of any contributory negligence, and whether such negligence, if any there was, was the proximate cause of the injury." *Grethen v. Chicago R. Co.* (C. C.), 22 Fed. 609, 19 Am. & Eng. R. Cas. 342; *The Burgundia* (D. C.), 29 Fed. 464; *Chicago R. Co. v. Logue*, 158 Ill. 621, 42 N. E. 53; *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682; *Carter v. Towne*, 103 Mass. 507; *Morrison v. Erie R. Co.*, 56 N. Y. 302; *Lannen v. Albany Gas Light Co.*, 46 Barb. 264; *Lannen v. Albany Gas Light Co.*, 44 N. Y. 459; *Bellefontaine R. Co. v. Snyder*, 18 Ohio St. 400, 98 Am. Dec. 175; *Kay v. Penn. R. Co.*, 65 Pa. St. 276, 3 Am. Rep. 628; *North Penn. R. Co. v. Mahoney*, 57 Pa. St. 187; *Pittsburg R. Co. v. Caldwell*, 74 Pa. St. 421.

The circuit judge on the trial of this cause did instruct the jury that the contributory negligence of the mother, who was in actual custody of the child at the time of the injury, was imputable to the child. The court said:

"It further appearing that the child was brought upon the car by its mother, and was in her care and custody, the same degree of care and protection of the child was thus imposed on its mother as would have been imposed upon an ordinary passenger of intelligence and experience, * * * that degree of care and precaution that an ordinarily prudent person would have exercised under like circumstances and conditions; and in arriving at that you can look to the age of the child, the kind of car they were riding on, the fact that the cars in their ordinary travel necessarily cross switches and frogs and use curves upon the track; and if the proof shows that in crossing these frogs, switches, and curves there is jerk, jolt, or jostle occasioned thereby, that fact should be considered; and if the mother failed to exercise that degree of care and precaution for the safety and protection of the child incumbent on her as explained to you above, and such failure on the part of the mother was the proximate and controlling cause of its injuries, then the child could not recover in this action."

And further on in the charge, his honor charged as follows:

"Again, should you find that the mother of the plaintiff failed to exercise the ordinary care and caution for the protection of a child that has been explained to you above as incumbent upon her, and such failure upon her part was the proximate and controlling cause of his fall and injuries, then, and in that event, you should find for the defendant. So, also, should you find that the negligence of the plaintiff's mother and the negligence of the defendant company equally contributed toward the accident and injury, in such event you should find for the defendant.

"Should, however, you find that the negligence of the mother contributed

materially to the accident and injury to the child, but was not its proximate and controlling cause, that would not deprive the plaintiff of a right to recover, but should be taken by you in mitigation of the damages you would otherwise allow."

It will thus be seen that the doctrine of imputed negligence was distinctly charged by the circuit judge. But the precise proposition presented by the assignment of error is that the court failed and refused to charge that, if the negligence of the mother contributed proximately to bring about the accident, plaintiff could not recover. It will be observed that in the general charge already quoted the jury were told there could be no recovery if the negligence of the mother was the proximate and controlling cause of the injury, or if the mother and defendant equally contributed in producing the accident; but the court refused to charge that if the negligence of the mother proximately contributed in any degree to produce the injury the defendant company would not be liable. Ordinarily, such failure and refusal to charge would constitute prejudicial error for which there should be a reversal. *Nashville Ry. Co. v. Norman*, 108 Tenn. 334, 67 S. W. 479. But unless there are facts in the record showing heedlessness on the part of the child, and negligence on the part of the mother in failing to prevent the incautious act of the child, there would be no basis for imputing to the child any negligence on the part of the mother that proximately contributed to the injury.

It seems that even in jurisdictions where the doctrine of *Hartfield v. Roper* has been recognized, it is now held the rule is not applicable when it appears that the injured child, although *non sui juris*, has exercised ordinary care to avoid the injury, or, as it is otherwise expressed, when the child used due care there is no imputability. See cases cited in 7 Am. & Eng. Law, 451.

Says Mr. Thompson, a sensible interpretation of the rule is that if a child, though *non sui juris*, has not committed or omitted any act which would constitute negligence in a person of full discretion, an injury by the negligence of another cannot be defended on the ground of contributory negligence of the parent or custodian in not restraining the child. In such a case the child, being in a lawful place, and exercising what would be regarded as ordinary care in an adult, is entitled to recovery for an injury

occasioned by the wrongful act of another, irrespective of the conduct of the parents. *McGarry v. Loomis*, 63 N. Y. 104, 20 Am. Rep. 510.

A sententious statement of this rule is made by Hogeboom, J., in *Lennan v. Albany Gas Light Co.*, 44 N. Y. 459, viz.:

"I know of no just or legal principle which, when the infant himself is free from negligence, imputes to him the negligence of the parent, when if he were an adult he would escape it. This would be, I think, visiting the sins of the fathers upon the children to an extent not contemplated in the Decalogue, or in the more imperfect digests of human law."

The uncontradicted proof in this record is that at the time of the accident the child was seated in a place provided for passengers, with his right hand holding to the guard attached to the seat. He was not leaning out, or standing on the seat or floor, or committing any other negligent or incautious act, even if negligence might be ascribed to one so immature in years. While the child was thus in the exercise of as much care as an adult could be under similar circumstances, there was a plunging of the car into the depression caused by the defective track, and he was jostled off, just as an adult might have been under like conditions. If the child was in no fault, how is the negligence of the mother to be imputed to it? There was no negligent act of the child that should have been prevented by the mother. The record shows that the mother was seated facing the child on the seat immediately opposite, where she could see all the movements of the child, and readily restrain any imprudent act on its part. So that, upon the uncontradicted proof, we fail to perceive any negligence either on the part of the mother or child. Hence the failure and refusal of the circuit judge to charge that any proximate contribution of negligence on the part of the mother would defeat the child's right of recovery was innocuous, and not reversible error.

It is assigned as error that the court refused to charge, viz.:

"When it is said that a carrier of passengers must provide for their safety, as far as human skill and foresight will go, it is not meant that he shall exercise all that care and diligence of which the human mind can conceive, or all the skill and ingenuity of which he is capable. The law only requires of it all those things necessary for the safety of the passenger that are reasonable and consistent with the business of the carrier, and proper to the means of conveyance employed by him to be provided, and that the highest

degree of practical care and diligence and skill shall be adopted that is consistent with the mode of conveyance used, and that will not render its use impractical and inefficient for its intended purposes."

It suffices to say, in answer to this assignment of error, that the court did not charge that a carrier of passengers must provide for their safety as far as human skill and foresight will go, and hence there was no occasion to explain what was meant by those terms. The circuit judge might properly have charged that rule as applied to the liability of a carrier to his passengers, but as a matter of fact he only charged that "it was incumbent upon the defendant to keep its track, cars and appliances, * * * its switches and frogs, * * * in reasonably safe order and condition." Surely there can be no reasonable ground on the part of the company to complain of this charge.

It results there is no error in the record, and the judgment will be affirmed.

Houston Electric Co. v. Robinson.

(Texas — Court of Civil Appeals.)

1. INJURY TO CONDUCTOR BY CONTACT WITH POLE SUPPORTING TROLLEY WIRE; ASSUMPTION OF RISK.¹—Where a conductor while engaged in the performance of his duties is knocked from the car by a pole supporting the trolley wire placed in dangerous proximity to the track, the negligence of the street railway company in locating its poles in such dangerous proximity to the track is not actionable unless it appear that the conductor had no knowledge of such negligence. If the conductor knew of the dangerous proximity of the poles the risk of injury was one of the ordinary risks incident to his employment, and was assumed by him.
2. LANGUAGE OF COUNSEL IN ADDRESSING JURY.—Language used by a counsel for the plaintiff in addressing the jury that the jury should by its verdict compel corporations to exercise care toward their employees, while unnecessary, is not sufficient to authorize a reversal of the verdict when it does not appear that the jury was influenced by such language. Language employed by such counsel commenting upon the testimony of

1. As to injury to street railway conductor by contact with pole supporting trolley wires along track, see note to *Withee v. Somerset Traction Co.*, 2 St. Ry. Rep. 380, (Me.) 56 Atl. 204. See also *Hoffmeier v. Kansas City & L. R. Co.*, 2 St. Ry. Rep. 288, (Kan.) 75 Pac. 1117.

a conductor as to the custom prevailing in respect to the collection of fares by conductors from the running-boards on both sides of the cars, although improper and unnecessary, does not authorize a reversal unless it was of such a character as to influence the jury.

ERROR brought by defendant from judgment for plaintiff. Decided June 24, 1903. Reported (Tex. Civ. App.) 76 S. W. 209.

Baker, Botts, Baker & Lovett, for plaintiff in error.

Lovejoy & Malevinsky, for defendant in error.

Opinion by **FLY, J.**

This is an action for damages arising from personal injuries alleged to have been inflicted through the negligence of plaintiff in error. The sum of \$5,000 was recovered by defendant in error.

Defendant in error was a conductor on a street car, in the employ of plaintiff in error, and the negligence relied upon consisted in the fact that the poles supporting the trolley wire were placed in such dangerous proximity to the track that defendant in error, while in discharge of his duty, came in contact with one of the poles, and was knocked off the car and injured. The defense was that the conductor knew of the condition of the poles, and assumed the risk of being knocked off, and also that he contributed to his injury by taking a position on the wrong side of the car.

The facts justify the conclusion that appellee was injured in the sum found by the jury through the negligence of appellant in placing its posts in such dangerous proximity to the track that the appellee, while in the careful discharge of his duties as an employee of appellant, was struck and knocked from a street car. Appellee did not know of the dangerous manner in which the posts had been erected, and was not guilty of contributory negligence.

The second and eighth assignments of error are grouped; the former complaining of the third paragraph of the charge of the court, the latter of a special charge requested by defendant in error, and given by the court. The third paragraph of the charge is as follows:

"If from the evidence you believe the plaintiff was injured, but that his injuries resulted from conditions and risks which were the ordinary incidents of the service and work in which he was engaged, and were not due to any

negligence of defendant in the matters recited in the paragraph above, then in such state of facts, if any, you will find for the defendant, as the plaintiff in entering into defendant's employment assumed all the ordinary risks of said business." In addition the court, at the request of defendant in error, charged the jury: "You are instructed that if you believe from the evidence that the plaintiff was knocked off the car by the pole, as alleged by him in his petition, and that the pole was so near the track that in the maintenance of same the receiver failed to use that degree of care that would have been used and exercised by ordinarily prudent persons under the same or similar circumstances, then you are instructed that this would not be one of the risks ordinarily incident to his employment."

The charges present the issue of the assumption of the ordinary risks incident to the work of operating cars upon the tracks of street railway companies, and as abstract propositions of law are correct. *Railway Co. v. Emery* (Tex. Civ. App.), 40 S. W. 149; *Railway Co. v. Hannig*, 91 Tex. 347, 43 S. W. 508; *Railway Co. v. Pitts* (Tex. Civ. App.), 42 S. W. 255. It is the rule that the servant, in entering the service of the master, assumes all the ordinary risks incident to the peculiar business in which the master is engaged. The ordinary risks referred to are those that are common to the particular business, and ordinarily connected therewith. The risks are assumed because, being incidents of the business wherever performed or conducted, the servant is charged with knowledge of them, for the assumption of risks is based on knowledge of their existence. There are cases, however, where the servant not only assumes the ordinary risks incident to the business in which the master is engaged, but, in addition, assumes risks not ordinarily incident to the business in which he is employed; such assumption not being based, as in the first instance, on the fact that they are inseparably connected with the prosecution of the business, but on the knowledge of a defect in the machinery or appliances in the identical service in which the servant is engaged. In the first case the risks are assumed, because they naturally and usually attend the prosecution of the business; in the second, because the servant knows, or by the exercise of ordinary care and prudence should know, that there is a defect in the appliances.

The paragraph of the charge of the court is a correct proposition of law. A servant assumes all the risks ordinarily incident to the business in which he is employed, and it was correct to say that he could not recover if the injuries resulted from any con-

dition or risk ordinarily incident to the business, and which was not due to the negligence of the master. Under the facts of this case, the charge should have gone further, and the jury should have been instructed that if appellee knew of the negligence, he could not recover; but the omission was fully supplied in other portions of the charge. It is true that risks ordinarily incident to the business in which appellee was engaged were not involved in this case; the sole questions being, did appellant negligently place its poles too close to its railway track, and, if so, was appellee cognizant of the fact? The charge is not complained of on the ground that it interpolates matters that would tend to confuse the jury; the sole proposition being that the charge instructed the jury that there is no assumed risk as to matters arising from the negligence of the master. It is not contended that the charge was misleading.

The special charge complained of, in connection with the court's charge, instructed the jury that if the pole was closer to the track than it was usual to place them, the danger arising from it would not be such as are ordinarily incident to the business. The instruction, as an abstract proposition of law, is correct.

The following paragraphs of the charge should be read in connection with the paragraph above copied, and, when so read, there is no probability that the jury was misled by the matters complained of:

"If from the evidence you believe the plaintiff was injured by a defective pole, as alleged by plaintiff, but should you also believe that prior to the time of said accident he knew of such defect, if any, in said pole, and with such knowledge remained in the employ of the company, or if from the evidence you believe that he must have known of such defect, if any, in the pole, in the exercise of ordinary care in the performance of his own duties as conductor, then in such state of facts, if any, the risk of injury from said pole would be one of the assumed risks of the employment, and plaintiff could not recover. If you believe from the evidence that plaintiff was injured by a pole which was too close to the moving cars, and if from the evidence you believe that plaintiff did not know of the position of said particular pole, but if from the evidence you believe that the poles generally along said line are equally as close to the moving cars as the one in question, and that this fact, if any, was known to plaintiff, or must have been known to him in the exercise of ordinary care in the performance of his duties as conductor, then in such state of facts, if any, the risk of injury from the defective pole, if any, would be one of the assumed risks of the employment, and in such state of facts, if any, you should return a verdict for defendant."

The charges last copied bring out clearly the issues applicable to the facts in this case, and, in the absence of any assignment or proposition complaining of conflict in the charges, the court should not consider that question. The only proposition under the assignment complaining of the clause of the court's charge and the requested charge first copied is not clear, but no complaint is made but that the charges instruct the jury "that there is no assumed risk on the part of the plaintiff with reference to the condition of affairs caused by defendant's negligence." To that proposition appellant must be confined. *Railway Co. v. Shelton* (Tex. Sup.), 72 S. W. 165. The charges requested by appellant were properly refused. In so far as they were correct, and contained any law applicable to the facts, they had been anticipated by the charge of the court.

The language of counsel for appellee, in which the jury were advised that they should by their verdict compel corporations to exercise care toward their employees, was unnecessary, and should not have been indulged in; but, in view of the facts and the amount of the verdict, it does not appear that the jury was influenced by the argument. No complaint is made of the size of the verdict.

The evidence was overwhelming to the effect that it was customary for conductors to collect fare on both sides of the cars, only one employee of appellant testifying that it was not usual so to do; and counsel in attacking his testimony said he and everybody else knew that such custom prevailed. We cannot conceive that the language, although improper and unnecessary, could have had any influence with the jury. We must presume that the jury had average intelligence and honesty.

The court very properly denied the privilege to appellant of examining the jury after the verdict had been returned as to what they had considered in arriving at a verdict.

The conclusions of fact dispose of the other assignments of error.

A former opinion in this case is withdrawn, and the judgment is affirmed.

Romine v. San Antonio Traction Co.

(Texas — Court of Civil Appeals.)

INJURY CAUSED BY FRIGHT OF HORSE;¹ INSTRUCTION AS TO NEGLIGENCE IN DRIVING FRACTIOUS HORSE.—The plaintiff was injured by a horse which he was driving becoming frightened by a street car propelled at an excessive rate of speed coming suddenly around a curve onto a bridge; the horse in his fright backed the wagon in which the plaintiff was riding upon the track of the defendant and the wagon was struck by one of the defendant's cars, and the plaintiff was thrown from his wagon. The court charged in effect that if the horse which the plaintiff was driving was fractious, the plaintiff was guilty of negligence, which, if contributing to the injury, precluded recovery. It was held that such instruction was erroneous, there being no evidence except the fright of the horse on the occasion of the accident, tending to show that the horse was fractious.

APPEAL by plaintiff from judgment for defendant. Deceided November 4, 1903. Reported (Tex. Civ. App.) 77 S. W. 35.

Bell & McAskill, for appellant.

Houston Bros. and R. J. Boyle, for appellee.

Opinion by NEILL, J.

This suit was brought by appellant against the traction company to recover damages for personal injuries alleged to have been caused by the negligence of the company. The negligence charged as the cause of the injury was that appellee ran one of its cars, in violation of an ordinance of the city of San Antonio, at a greater rate of speed than three miles an hour around a curve and across a bridge which appellant was crossing in a horse cart, and that by reason of the car, propelled at such speed, coming suddenly around the curve and on the bridge, the horse, drawing the cart in which appellant was riding, became frightened and unmanageable, and backed the cart upon appellee's road track in front of the moving car, and, as the car struck the cart, appellant, to

1. As to liability of street railway company for injuries caused by horse frightened by negligent operation of street car, see note to *Lincoln Traction Co. v. Moore*, *ante*, p. 642.

avoid being mangled beneath the car, caught its guard-rail, when the motorman reversed and suddenly started the car backwards, jerking appellant from his cart, and throwing him on the bridge floor, whereby he was injured. The appellee answered by a general denial and a plea of contributory negligence, in which it was charged that appellant was guilty of negligence in driving a fractious horse, and that such negligence proximately contributed to his injury. The case was tried before a jury, and the trial resulted in a verdict and judgment in favor of the company.

The appellee maintains a street railway in the city of San Antonio, over which it operates its cars by electricity. Its road extends over a bridge that spans the San Antonio river on Navarro street. Near the south end of the bridge Crockett street crosses Navarro. In going north, before reaching the bridge, along Navarro, there is a curve in the railroad track, commencing at or near the south side of Crockett street. The record does not disclose the width of this street, but the length of the bridge is about seventy-five feet. At the time of the alleged accident there was in force a city ordinance restricting the speed of electric cars while running around curves and across bridges to three miles per hour. On the 19th day of July, 1901, appellant, while going south along Navarro street, drove his mare, attached to a cart in which he was riding, on the north end of Navarro street bridge; and at the same time one of appellee's cars, propelled by electricity, was approaching the bridge from the opposite direction. There is testimony tending to prove that, in rounding the curve at the intersection of Crockett and Navarro streets, the speed of the car greatly exceeded the limit fixed by the city ordinance, and that appellant's mare became frightened at the approaching car, and backed the cart on the railway track, and that it was struck by the car, and that appellant, by reason of the action of the frightened animal, fell or was thrown from the cart and injured. There is not a particle of evidence in the record, barring the fright and action of the animal on the occasion of the accident, tending in the least to show the mare was fractious. The appellant testified that she was gentle, and remarked to his companion in the cart as the car approached them, "The mare is not scary." His wife testified: "The horse was gentle. I had drove her a great deal, and she did not scare at street cars previous to the time he was hurt."

The court, in its charge, submitted as an issue contributory negligence, in the following language: "If you find that plaintiff was driving a fractious horse, that became frightened upon the approach of said street car, and that in driving said fractious horse, if you find he was a fractious horse, under all the circumstances, he was guilty of negligence, and that if such negligence, if any, proximately contributed to the accident and injury, if any, to plaintiff, then plaintiff cannot recover, and you will so find." The submission in the charge of the issue of contributory negligence is assigned as error, upon the ground that there is no evidence tending to support such defense. The mere fact that a horse took fright at an approaching street car negligently operated cannot, alone, be taken as evidence that the animal was fractious, for, if it were, then the very evidence required to make out a case of damages resulting from negligence in frightening a horse could of itself alone be taken as sufficient to defeat the action. This demonstrates the error in the part of the charge quoted, for it is axiomatic that a charge which submits as an issue a matter of defense, without evidence tending to support it, is erroneous. It cannot in this case be said the error is harmless, for the jury may have found from the evidence that every essential allegation to plaintiff's cause of action was established, yet *non constat* that the jury did not take the mere fright of the animal as evidence that she was fractious, and, therefore, found that appellant was guilty of contributory negligence.

For reason of the error indicated, the judgment is reversed and the cause remanded.

San Antonio Traction Co. v. Welter.

(Texas — Court of Civil Appeals.)

INJURY TO PASSENGER ATTEMPTING TO ALIGHT.¹—The plaintiff was injured while attempting to alight from a car after it had stopped, by the sudden starting of the car while she was in the act of alighting. A charge to the jury to the effect that if it believed that the plaintiff attempted to alight from the car after it had stopped, and that while she was in the act of alighting the car was suddenly put in motion

1. See note to *Champagne v. LaCrosse City Ry. Co.*, *post*. p. 988.

without giving her sufficient time to alight, then the plaintiff should recover, is not objectionable as assuming the fact to be that the car had stopped when the plaintiff attempted to alight.

APPEAL by defendant from judgment in favor of plaintiff. Decided November 18, 1903. Reported (Tex. Civ. App.) 77 S. W. 414.

Houston Bros. and R. J. Boyle, for appellant.

Perry J. Lewis and H. C. Carter, for appellee.

Opinion by NEILL, J.

This suit was brought by appellee against appellant to recover damages for personal injuries inflicted by the negligence of the company. Appellant answered by a general denial and by a plea of contributory negligence, in which it is averred that appellee negligently attempted to alight from one of appellant's street cars while it was in motion, and thereby caused the injuries complained of. The evidence is sufficient to warrant the conclusions that on the 29th of March, 1902, appellee, a woman seventy-five years old, boarded one of appellant's street cars as a passenger; that, when it arrived at the point of her destination, the car stopped, and when she was in the act of alighting therefrom it was, by the negligence of the company's servant operating the same, suddenly put in motion, before giving her time to alight, and she was, by such negligence, without any contributory negligence on her part, thrown violently upon the ground, whereby she was seriously and permanently injured, and caused great physical and mental suffering, to her damage in the sum of \$3,500.

The first assignment complains of the following paragraph of the charge:

"If you believe from the evidence that on or about the 29th day of March, 1902, plaintiff boarded one of defendant's street cars, and became a passenger thereon, and that she attempted to alight therefrom after said car had stopped, and if you further believe from the evidence that while she was in the act of alighting from said car the car was suddenly put in motion, without giving her sufficient time to alight, and if you further find from the evidence that the defendant was guilty of negligence in failing to give the plaintiff sufficient time to alight from its car, and in suddenly starting said car, if you so find the facts to be, and that such negligence, if any, directly caused plaintiff to fall, and that she was injured thereby, then your verdict

should be for the plaintiff, unless you find, under the charge hereinafter given you, that the plaintiff was guilty of negligence herself that contributed to her injury."

It is urged under the assignment, as an objection to the charge, that it "assumed the fact to be that defendant's car had stopped when plaintiff undertook to alight therefrom," when the existence of such fact was an issue made both by the pleadings and the evidence. We do not think the charge obnoxious to the objection. In our opinion, the question of the existence of such fact, as well as all others essential to plaintiff's recovery, is submitted by the charge for the jury's determination. *San Antonio & A. P. Ry. Co. v. Belt* (Tex. Civ. App.), 59 S. W. 610; *G., H. & S. A. Ry. Co. v. Waldo* (Tex. Civ. App.), 32 S. W. 783, and authorities cited. A charge should be taken as a whole, and, when the part complained of is taken and considered with the fourth paragraph, it is too clear for argument that it does not assume such fact.

The charge upon the measure of damages is in the very language of numerous charges given in cases of this character, and upheld by all the higher courts in this State.

Our conclusions of fact dispose of the assignment which complains of the verdict being excessive.

There is no error in the judgment, and it is affirmed.

Von Diest v. San Antonio Traction Co.

(Texas — Court of Civil Appeals.)

ORDINANCE REQUIRING FENDER AND A CONDUCTOR AND MOTORMAN ON STREET CAR; APPLICATION TO TRAILERS.—A city ordinance¹ requiring street cars to be provided with car fenders of the most improved design and construction, and that one conductor and one motorman shall be employed on each electric car should not be construed so as to require a fender and a conductor and motorman on trailers.

As to municipal ordinances controlling the operation of street railways generally, and the reasonableness of ordinances requiring fenders, see note to *People v. Detroit United Ry., etc., Co., ante*, p. 460.

APPEAL by plaintiff from judgment for defendant. Decided November 25, 1903.
Reported (Tex. Civ. App.) 77 S. W. 632.

Jas. Routledge, Selig Deutschman, and Harry Wurzbach, for appellant.

Houston Bros. and R. J. Boyle, for appellee.

Opinion by FLY, J.

This is a personal injury suit instituted by appellant to recover damages alleged to have accrued through the negligence of appellee in suddenly starting its car when appellant was attempting to get on the same, and the failure of appellee to have a fender and a conductor and a motorman on the trailer, as required by ordinance of the city. The verdict and judgment were in favor of appellee. By a strong preponderance of the evidence, it was shown that appellant was injured by attempting to board a car while it was moving. The car which he attempted to get on was a motor car, to which was attached a car without a motor, known as a "trailer." Appellant missed his hold on the motor car, and fell in the rear of it, and his arm was run over and crushed by the trailer. No negligence was shown upon the part of appellee.

There was an allegation in the petition that appellee was negligent in not having a fender and a conductor and motorman on the trailer, which, it is contended, is required by the ordinances of the city of San Antonio. The court sustained exceptions to that portion of the petition. The ordinances referred to are as follows:

"Sec. 59. It shall be unlawful for any person, firm or corporation, or for any officer or employee of a corporation to operate or run upon any public street, avenue, plaza or square, of the city of San Antonio, any street car unprovided with a car fender of the most improved design and construction."

"Sec. 15. Hereafter no electric car shall be propelled or operated within the limits of the city of San Antonio, without having one conductor and one motorman thereon."

It is the contention of appellant that language of the ordinances support the allegations of the petition, and that it is the duty of the street railway company to have fenders and conductors and motormen not only on motor cars, but on cars thereto attached that have no motors, and that are dependent upon the motor car

for power and motion. It may be that a literal construction of the ordinances would give support to the contention, but statutes and ordinances must have a reasonable construction upon them, and not one repugnant to common sense. In the case of *Russell v. Farquhar*, 55 Tex. 355, the statute was under consideration which provides that no judgment or decree for the title to land or for the partition of land shall be received in evidence unless recorded in the county in which the land is situated, and it was held that the statute was intended for the protection of *bona fide* purchasers and creditors, and had no reference to others. The Supreme Court said:

"If courts were in all cases to be controlled in their construction of statutes by the mere literal meaning of the words in which they are couched, it might well be admitted that appellant's objection was well taken. But such is not the case. To be thus controlled, as has often been held, would be for courts, in a blind effort to refrain from an interference with legislative authority, by their failure to apply well-established rules of construction, to in fact abrogate their own power, and usurp that of the Legislature, and cause the law to be held directly the contrary of that which the Legislature had in fact intended to enact. While it is for the Legislature to make the law, it is the duty of the courts to 'try out the right intendment' of statutes upon which they are called to pass, and by their proper construction to ascertain and enforce them according to their true intent. For it is this intent which constitutes and is in fact the law, and not the mere verbiage used by inadvertence or otherwise by the Legislature to express its intent, and to follow which would pervert that intent."

This language is quoted and approved in *McInery v. Galveston*, 58 Tex. 334, and *Edwards v. Morton*, 92 Tex. 152, 46 S. W. 792. The city council, in passing the ordinance as to fenders, had in view the protection of citizens from injury by cars propelled by electricity, and could not have contemplated that fenders should be placed on a car without the powers of locomotion within itself, and which could only be carried along the street railway tracks by being coupled to a car provided with motive power. The object in having a conductor and motorman on a car, it is clear, was to procure the undivided attention of one man to the propulsion of the car, in order that the safety of passengers and those using the street might not be endangered. To hold that the ordinance intended that a motorman should be put on a car that had no motor would be to render it absurd and ridiculous, and is a fine example

of what positions courts would be led into by a literal construction of statutes in every instance. Whenever literalism becomes antagonistic to common sense and reason, it must be set aside in judicial construction. If it cannot be reasonably held that it was intended that a motorman should be placed on a car coupled on behind a motor car, why should it be held that it was intended that such car should be provided with a fender? In the very nature of things, the trailer could not be the car that would strike any person or other obstruction on the track, and there could be no object in having it provided with a fender to protect against dangers which could not arise. It will not be seriously contended that a fender was demanded by the ordinance to protect people who might fall down between the trailer and the motor. We think that, within the spirit of the ordinance, the two cars coupled constituted one car, and a fender on the front car and one conductor and motorman were all that was required by the ordinance. In a trial amendment, appellant alleged that, if a fender had been provided for the trailer, it would have prevented his injury, and, if there had been a motorman and conductor on the second car, that the cars could have been stopped in time to have prevented his injury. This pleading was not excepted to, but no evidence was introduced tending to show that appellant would not have sustained the same injuries, had there been a fender and a conductor and motorman on the trailer. The question as to whether the conductor could have stopped the car and prevented the injury if he had been on the rear platform of the motor car, or the front platform of the trailer, could have been answered only by an opinion on the part of appellant, and was properly excluded. The conductor swore that he tried to catch appellant as he fell, and at once gave the signal for an immediate stop, and then applied the brake on the trailer. He swore that the car was stopped within fifteen feet. The whole testimony united to show that the conductor was on the front platform of the "trailer," and that he did all in his power to stop the car and prevent the accident. Appellant did not swear that the conductor was not on the platform of the trailer, but simply that he did not see a conductor on either car.

The fourth and fifth assignments of error are without merit. The court correctly presented every issue in the case, and did not

err in refusing to give the special instructions asked by appellant. The only case presented by the pleadings and evidence of appellant was that the car stopped in answer to his signal, and that, while he was in the act of getting on, it was suddenly started, and he was thrown to the ground and injured. Appellee met the issue by pleading and proof that, when the appellant attempted to get on the car, it was moving, and that he was precipitated, through his own negligence, to the ground between the cars. The court fully presented the case made out by the appellant, and then, in effect, told the jury that, if they did not find that the facts sustained appellant's case, they would find for appellee. Appellant desired another phase of the case than that made by his pleadings and evidence presented to the jury, and the court properly refused to present it. There was no evidence tending to prove that the car was moving slowly at the time he attempted to board it. He swore it had come to a full stop. The others swore that it did not "slow down" at all, but was moving at the rate of from three to five miles an hour.

The verdict is sustained by the evidence, and the judgment is affirmed.

Houston Electric Co. v. Nelson.

(Texas — Court of Civil Appeals.)

INJURY TO PASSENGER CAUSED BY COLLISION WITH VEHICLE;¹ INSTRUCTION AS TO DEGREE OF CARE.—The plaintiff, a passenger on one of the defendant's cars, was injured by a collision with a vehicle. The court refused to charge the jury that if the motorman in charge of the car was in the exercise of a very high degree of care and prudence to prevent the accident, then the defendant would not be liable, and also refused a requested charge to the effect that the company is not an insurer of the safety of its passengers, and the mere fact that the car collided with the vehicle does not in itself establish liability against the defendant. It was held that the court erred in refusing to charge as to the degree

1. Other cases in this volume pertaining to injuries received by passengers in collisions with vehicles are: *Jones v. United Rys. & Elec. Co.*, 2 St. Ry. Rep. 406, (Md.) 57 Atl. 620; *Frank v. Metropolitan St. Ry. Co.*, 2 St. Ry. Rep. 798, 91 App. Div. (N. Y.) 485, 86 N. Y. Supp. 1018.

of proper care, and that it should have charged to the effect that carriers of passengers are not insurers of the safety of their passengers, but are only held to the exercise of that high degree of care in respect to their safety, which very prudent and cautious persons would use under like circumstances, and, if such care is shown, or if the lack of it does not appear, liability is not established.

APPEAL by defendant from judgment for plaintiff. Decided December 18, 1903.
Reported (Tex. Civ. App.), 77 S. W. 978.

Baker, Botts, Baker & Lovett, for appellant.

Opinion by GILL, J.

This is a suit by the appellee against the appellant for damages for personal injuries alleged to have been sustained by his wife as a result of a collision between one of the street cars of appellant (on which his wife was a passenger) and a water cart. The collision is alleged to have been due to the negligence of the servants of appellant in charge of the street car. Appellant answered by general denial. Verdict and judgment were for plaintiff, and defendant has appealed.

The evidence adduced was conflicting both on the issue of the negligence of the company and the effect of the accident on the plaintiff's wife. In view of the result of this appeal, we do not find it necessary to state more fully the facts or the nature of the case.

The court, after defining generally the degree of care which bound defendant with reference to the protection of its passengers, submitted the facts upon the following charge, and no other:

"If you believe from the evidence that the plaintiff's wife was injured by a car colliding with a water cart, as charged in his petition, and in the manner as charged in the petition, then you will find for the plaintiff such damages (if any) as the plaintiff has received by reason of the injury, taking into consideration the expense of cure and such amount as the services of plaintiff's wife have been to him diminished in value by reason of the injury, and the jury may take into consideration the permanency of such injury as they may find from the evidence in estimating the damages, if any. If the jury do not believe the plaintiff's wife was injured as charged in plaintiff's petition and in the manner therein charged, they will find for defendant."

To this charge several objections are urged, the first being that the charge is a virtual assumption that plaintiff may recover if

his wife was injured, and this regardless of whether the company's negligence caused the collision or not. That there was a slight collision between the car and a water cart is undisputed; and while the charge, read in the light of the petition, may be correct in the abstract, it is clearly misleading on the face of it. The most easy and natural construction to place on it is that, if the plaintiff has shown a collision, and consequent injury to his wife, liability is established irrespective of other proof. Whatever may generally be the probative weight of the accident itself on the issue of negligence in passenger accident cases, this is certainly not a case in which the court might assume that proof of the collision established the allegation of negligence. The nature of the accident and its causes were fully disclosed, and, if the jury believed the witnesses adduced by the defendant, the servants of the defendant were without fault.

The action of the court in referring the jury to the pleadings for the issues is also criticised. Ordinarily, this might not be error requiring a reversal, but we nevertheless regard it as a practice which should not be encouraged. What issues are made by the pleadings is a question of law for the court, and they should be so determined and distinctly presented in the charge. *Bradshaw v. Mayfield*, 24 Tex. 483; *Barkley v. Tarrant Co.*, 53 Tex. 257.

The defendant requested the trial court to instruct the jury that if the motorman in charge of the car was in the exercise of a very high degree of care and prudence to prevent the accident, then defendant would not be liable. The defendant was entitled to have the issue of proper care submitted to the jury in terms, and the court erred in refusing to do so.

Defendant complains also of the refusal to give a requested special charge to the effect that the company is not an insurer of the safety of its passengers, and the mere fact that the car collided with the wagon does not in itself establish liability against defendant. The charge should not have been given in the form requested. The rule is that carriers of passengers are not insurers of the safety of their passengers, but are only held to the exercise of that high degree of care in respect to their safety which very prudent and cautious persons would use under like circumstances, and, if such care is shown, or if the lack of it does not appear,

liability is not established. The defendant was entitled to such a charge. But to charge either way upon the happening of the accident as an evidential fact would have been, under the facts of this case, upon the weight of evidence.

Some of the criticisms of the court's charge on the measure of damages are well founded, but the rules upon the subject are so simple and well settled we cannot believe the errors will be repeated upon another trial. We, therefore, do not notice them further.

For the errors indicated, the judgment of the trial court is reversed, and the cause remanded.

Reversed and remanded.

Cases in Court of Civil Appeals of Texas Not Reported in Full.

1. INJURY TO PASSENGER BY SUDDEN START BEFORE BEING SEATED.—In the case of *Pelly v. Denison & Sherman Ry. Co.* (Tex. Civ. App.), 78 S. W. 542, it appeared that the plaintiff boarded one of the cars of the defendant, and before she had reached a seat and sat down she was precipitated against one of the seats in the car by the sudden start of the car, producing serious injury. From the plaintiff's evidence it appeared that she was in poor health, having suffered an attack of la grippe; that there was but one vacant seat in the car when she entered, which was near the front end of the car, and that she did not pass any vacant seats before the car was put in motion; that the conductor on the car was informed when the plaintiff entered it that she had been sick, and needed assistance. For the defense it appeared that the car was not started with a jerk; that she was not thrown against one of the seats of the car; that she experienced no accident or injury while walking to her seat, and that she passed three vacant seats in the car before the car was put in motion.

The court instructed the jury that if it believed from the evidence that the car was started while the plaintiff was walking to a seat therein, and before she had reasonable time to get seated, and that by so starting said car she was thrown against a seat and injured, and that if the jury believe that the car was started in such a manner as to constitute negligence, and that such negligence was the direct and proximate cause of the injury, the jury should find for the plaintiff. Such instruction was held to be correct, and not assailable because making the plaintiff's right to recovery depend upon the defendant's negligence being the proximate cause of the injury.

The facts stated to the effect that the defendant's conductor was notified of the weakness of the plaintiff did not raise the issue of discovered peril.

The only evidence in the case as to contributory negligence being to the effect that she passed two or three vacant seats after entering the car, without taking them, it was not error for the court in its charge to single out such fact in presenting the issue of contributory negligence.

A judgment for the defendant was affirmed.

2. COLLISION WITH VEHICLE AT STREET INTERSECTION; DUTY TO LOOK BACK.—

In the case of *El Paso Electric Ry. Co. v. Kendall* (Tex. Civ. App.), 78 S. W. 1081, the plaintiff sought to recover damages for injuries to his minor son caused by a collision between a vehicle which he was driving and a street car of the defendant at a street intersection. The defendant contended that the plaintiff's evidence showed that the boy was guilty of contributory negligence, and that it was error to charge the jury that the burden of proof on the issue was upon the defendant. It was held that a child of twelve years of age cannot, in any ordinary case, be held guilty of contributory negligence as a matter of law. The boy testified that before crossing the track he looked out of the front and sides of the vehicle in which he was driving and saw no car, heard no signals, and did not know of the presence of the car until it struck the wagon. He also testified that there was nothing to obstruct his view and that if he had been keeping a lookout he would have seen the car. Such facts do not necessarily show contributory negligence as a matter of law.

A judgment for the plaintiff was affirmed.

3. INJURY TO PEDESTRIAN; DUTY OF MOTORMAN TO AVOID INJURY TO PERSON APPROACHING TRACK.—

In the case of *Galveston City Ry. Co. v. Hanna*, (Tex. Civ. App.), 79 S. W. 639, it appeared that the plaintiff, a boy of about twelve and one-half years of age, while crossing a street in which the cars of the defendant were operated, was struck by one of such cars, knocked down and seriously injured. At the time of the accident the plaintiff was crossing the street diagonally from northeast to southwest, and the car which struck him was running along the street from west to east. The car was being operated at an excessive rate of speed, estimated by some of the witnesses at from fifteen to eighteen miles an hour. The motorman saw the plaintiff approaching the track, and also saw that he was oblivious to the approach of the car, but made no effort to lessen the speed of the car until just before the collision occurred, and when it was too late to stop it so as to prevent its striking the plaintiff. If the car had not been running at a rate of speed exceeding four or five miles an hour, it might have been stopped within a distance of twenty-one feet. The car must have been at least 150 feet distant from the plaintiff when the motorman first noticed him approaching the track. The plaintiff, as he approached the track, was amusing himself by throwing into the air and catching a package which

he was carrying. He was so intent upon his sport that it was apparent to the witnesses who saw him that he did not observe the swiftly approaching car.

It was contended by the defendant that the evidence showed that the plaintiff's injuries were caused by his contributory negligence. The court held, however, that conceding the negligence of the plaintiff, it would not be authorized under the evidence to say that such negligence was the proximate cause of his injury. The issue of discovered peril was clearly raised by the evidence. When the defendant's motorman saw that the plaintiff was not aware of the approach of the car and would probably run upon the track in front of it, the duty at once devolved upon him to use every means in his power consistent with the safety of those upon the car to prevent injury to the plaintiff. It was not sufficient for the motorman to use every means in his power to prevent the injury after the plaintiff had run upon the track just in front of the car; he should have begun to use every means in his power to prevent the injury as soon as he saw that it was probable, and not waited until the danger became so imminent that the injury could not have been averted. The evidence of the motorman and of all the witnesses who saw the accident to the effect that the motorman attempted to call the plaintiff's attention by sounding the gong and hallooing to him, and that such efforts were unavailing made it the duty of the motorman, in the exercise of ordinary care to prevent the injury, to lessen the speed of the car, and not to have attempted to run by the plaintiff until satisfied that he was aware of the approach of the car.

A judgment for the plaintiff was affirmed.

City of Montpelier v. Barre & Montpelier Traction & Power Co.

(Vermont—Supreme Court.)

USE OF TRANSFERS ON CONSOLIDATED LINES.—A condition in a franchise to a street railway company fixing the rate of fare for riding upon the lines of the company within the limits of the city at five cents and requiring the company to give transfer tickets for use on all of its own lines does not require the holder of such franchise to give transfers for use on a line connecting its lines within the city with the lines of another street

STREET CAR TRANSFERS.

1. Issue of transfers.

- a. Nature of transfers.
- b. Status of persons holding transfers.
- c. Statutory provisions.

railway in another city, whose rights had been acquired by the former company, notwithstanding the fact that the franchise of the latter company was granted subject to similar conditions.

PETITION for mandamus compelling the defendant to comply with conditions of its franchise. Decided November 25, 1903. Reported (Vt.) 56 Atl. 278.

Frederick P. Carlton, for petitioner.

Richard A. Hoar and *Rufus E. Brown*, for petitionee.

Opinion by **HASELTON, J.**

This is a petition for a writ of mandamus. The petitioners are the city of Montpelier and Frank M. Corry, its mayor, who petitions on his own behalf and on behalf of all the citizens and

2. Presentment of transfers.

- a. Duty of passenger.
- b. Duty of company.

3. Ejection of passengers.

- a. Where verbally transferred.
- b. Where presenting torn transfers.
- c. Where transferred to the wrong line.
- d. Where transfer has a time limit erroneously punched.
- e. Damages, exemplary and compensatory.

4. In general.

- a. Ticket produced is conclusive.
- b. Notice of change of rules.

1. Issue of transfers. a. Nature of transfers.—The system of transfers is devised to afford to passengers paying the customary fare a means by which, on leaving the car at a designated point, they may be entitled, within a limited time and without further payment of fare, merely by the presentation of the so-called transfer check, to a continuation of their ride on another line of cars. The paper slip or ticket designated a transfer, when in the hands of the passenger, serves a twofold purpose: (1) To the passenger, as an evidence of his contract, by which he is entitled to continue his journey upon the connecting road; and, (2) To the company as a means of identification afforded to its conductors and servants by which they may know that the passenger presenting the transfer is entitled to ride without further payment of fare. *Ex parte Lorenzen*, 128 Cal. 431 (435), 61 Pac. 68.

The right of transfer from one line to another without extra charge is not the equivalent of a continuous ride on the same car to the place of destination. *State ex rel. City of St. Paul v. St. Paul City Ry. Co.*, 78

inhabitants of the city of Montpelier. The defendant is a corporation operating lines of street railway within the cities of Barre and Montpelier and the town of Berlin. Its lines or systems have been so connected that it now operates a continuous line from the city of Montpelier through the town of Berlin to the city of

Minn. 331 (341), 81 N. W. 200. Nor is the transfer private property to the extent that the holder may give another his rights in it. It is accepted subject to conditions legally imposed by the company. *Ex parte Lorenzen*, 128 Cal. 431 (438), 61 Pac. 68. The duty to give transfer tickets when so directed by city ordinances is a public duty arising out of the character of street railway companies. *Chicago Union Traction Co. v. City of Chicago*, 199 Ill. 579, 65 N. E. 470.

b. Status of persons holding transfers.—A person holding a transfer between connecting cars is held to be a passenger, with respect to the company, at any time while properly passing between the connecting cars at the designated time and place. So where plaintiff held a transfer and, as she was mounting the car to which she was transferred, at the transfer point, was injured, it was held that she was a passenger and the agents of the company owed her due care as such. *Washington, etc., Ry. Co. v. Patterson*, 9 App. Cas. (D. C.) 423. In *Keator v. Scranton Traction Co.*, 191 Pa. St. 102, 43 Atl. 86, plaintiff was given a check transferring her from one car to another a block distant. While approaching the second car she was injured by the breaking of the trolley-pole; it was held that she was entitled to damages unless the railway company could show the extraordinary care which it owes to a passenger. The passenger continued to be one, and entitled to ordinary care, even when walking between the connecting points. See also *Citizens' St. Ry. Co. v. Merl*, 134 Ind. 609, 33 N. E. 1014.

c. Statutory provisions.—It has been held in several cases that statutes or ordinances regulating street car transfers were valid and constitutional. In *Ex parte Lorenzen*, 128 Cal. 431, 61 Pac. 68, it was held that a municipal ordinance which requires that street car transfers be issued and delivered within the car where made, and received only within the car to which made, and forbidding any one except the conductor of the street car line to give, sell, or issue transfer checks or tickets, does not violate the first section of the Fourteenth Amendment of the United States Constitution guaranteeing personal liberty and the right of private property. Nor is it arbitrary, oppressive, or unreasonable. Its primary object is to advance the convenience and welfare of the traveling public. See also *Chicago Union Traction Co. v. City of Chicago*, 199 Ill. 484, 65 N. E. 451, where it was said that the power to fix fares includes the power to regulate the use of transfers. But in *Atlanta v. Old Colony Trust Co.*, 59 U. S. App. 230, 88 Fed. 859, 32 C. C. A. 125, where the common council of the city of Atlanta passed an ordinance requiring street railroads to carry passengers for a single fare of five cents and to give transfers, it was held that there was nothing in the

Barre, and the petition is for a writ of mandamus directing the defendant to issue to its Montpelier patrons transfers to the lines of the defendant in Berlin and Barre. The testimony, however, establishes that the defendant carries a passenger over its lines in the city of Montpelier and the town of Berlin to the Barre line on

charters of the city, the charter of the railroad, the statutes of the State, or the Constitution of the State which would give the city authority to pass such an ordinance.

The New York Railroad Law (chap. 565, Laws 1860, § 104, as amended by chap. 676, Laws 1892) provides: "Every such corporation (street railway) entering such contract (with another for the operation of a railroad) shall carry, or permit any other party thereto to carry, between any two points on the railroads or portions thereof embraced in such contract (i. e., § 78) any passenger desiring to make one continuous trip between such points, for one single fare not higher than the fare lawfully chargeable, by either of such corporations for an adult passenger. Every such corporation shall upon demand, and without extra charge, give to each passenger paying one single fare, a transfer entitling such passenger to one continuous trip to any point or portion of any railroad, embraced in such contract, to the end that the public convenience may be promoted, by the operation of the railroads embraced in such contract substantially as a single railroad with a single rate of fare. For every refusal to comply with the requirements of this section, the corporation so refusing shall forfeit fifty dollars to the aggrieved party. The provisions of this section shall only apply to railroads wholly within the limits of any one incorporated city or village." In *Mendoza v. Metropolitan St. Ry. Co.*, 51 App. Div. (N. Y.) 430, it was held that the term "embraced in such contract" in the statute, refers only to those roads operated by the contracting parties at the time the contract was made. In *Blume v. Interurban St. Ry. Co.*, 1 St. Ry. Rep. 569, 41 Misc. Rep. (N. Y.) 171, it was held that the statute applies to the Interurban Street Railway of New York city, and requires it to give for a single fare transfers over all its lines, wholly within the city limits. Also that the statute is a valid exercise of the police power.

The penalty for violation of the statute is for a refusal to carry any passenger *desiring* to make one continuous trip between such points for a single fare. In *Myers v. Brooklyn Heights Ry. Co.*, 10 App. Div. (N. Y.) 335, plaintiff took repeated rides on one of defendant's lines for the purpose of testing defendant, and with no destination on the connecting line. Each time he was refused a transfer. Held, that he could maintain no actions for the statutory penalty, for he showed no *desire*, such as is required by the language of the statute.

The proper proceeding to enforce observance of the statute is one brought on behalf of the public generally, and the railroad commissioners and the attorney-general have ample power to take such action to protect the public.

payment of a single five-cent fare. The defendant was incorporated by an act of the Legislature in 1892. February 10, 1896, the city council of the city of Barre granted it the right to construct and operate a street railway over various streets of said city, and made it a condition of the grant that the fare for riding

In *People ex rel. Lehmaier v. Interurban St. Ry. Co.*, 85 App. Div. (N. Y.) 407 (affirmed, *ante*, p. 751), the court refused to issue a mandamus against a street railway corporation to compel it to perform its statutory obligation to carry for a single fare, persons desiring to ride over its connecting lines, at the instance of a citizen who does not appear to have been denied the right which he seeks to enforce. The court, after reciting the provisions of the law as to the penalty, and the enforcement of the statute at the instance of the attorney-general, says: "It would seem to follow that a private individual has no right to compel the defendant by mandamus to issue these transfers."

2. *Presentment of transfers.* a. *Duty of passenger.*—It is held in a few cases that it is the duty of a passenger who presents a transfer, invalid on its face, to pay the required fare—or, refusing to pay, to leave the car,—and rely on an action for breach of the contract of carriage, for his redress. These cases do not allow the recovery of damages for ejection on the theory that with an invalid transfer the passenger has no right to resist the conductor. *Kiley v. Chicago City Ry. Co.*, 189 Ill. 384, 59 N. E. 794; *Anderson v. Am. Tract. Co.*, 7 Pa. Dist. Ct. 41.

In Massachusetts and Michigan it has been held to be the duty of the passenger to read his transfer. The leading case on this question is *Bradshaw v. South Boston R. Co.*, 135 Mass. 407. There the court said: "The conductor of a street railway car cannot reasonably be required to take the mere word of a passenger that he is entitled to be carried by reason of having paid a fare to the conductor of another car; or even to receive and decide upon the verbal statements of others as to the fact. The conductor has other duties to perform and it would often be impossible for him to ascertain and decide upon the right of a passenger except in the usual simple and direct way. The checks used upon the defendant's road were transferable, and a proper check, when given, might be lost or stolen or delivered to some other person. It is no great hardship upon the passenger to put upon him the duty of seeing to it in the first instance, that he receives and presents to the conductor the proper ticket or check; or, if he fails to do this, to leave him to his remedy against the company for a breach of its contract. Otherwise the conductor must investigate and determine the question, as best he can, while the car is on its passage. The circumstances would not be favorable for a correct decision in a doubtful case. A wrong decision in favor of the passenger would usually leave the company without remedy for the fare. The passenger disappears at the end of the trip. If the railroad company has agreed to furnish him with a proper ticket and has failed to do so, he is not at liberty to assert and maintain by force his rights under

upon the lines of the company within the city limits should be five cents, and that the company should give transfer tickets to all of its own lines. At this time the defendant had no authority, under its charter, to construct or operate a street railway within the limits of Montpelier. July 8, 1896, the city council of the city

that contract; but he is bound to yield for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way." Also in *Heffron v. Detroit City Ry. Co.*, 92 Mich. 406, 52 N. W. 802, the court said: "It was the duty of the plaintiff to read his ticket. His failure to read it cannot give him any right against the defendant which he would not have had, had he read it."

b. Duty of company.—In direct opposition to the view expressed in the above cases, is that asserted in *Memphis St. Ry. Co. v. Graves*, 1 St. Ry. Rep. 760, (Tenn.) 75 S. W. 729, where it is said: "The tickets or tokens are prepared by the company. They contain more or less of printed and other directions. Some passengers cannot read. Others are children. None of them have the time or opportunity in the rush of travel to scrutinize the ticket, and in many instances if they did they could not understand the devices used by the company. The passenger has the right to assume the conductor has given him the proper ticket; and if he make a mistake it is the fault of the company, for which it is liable; and if the passenger in good faith accept the ticket, he is not bound to stop and scrutinize it, to see that no mistake has been made." See further 3, "Ejection of Passengers."

3. Ejection of passengers. a. Where verbally transferred.—In a majority of the cases it is held that a passenger verbally transferred by an agent of the company, and ejected by an agent on the car to which transferred, for refusal to pay another fare, may have an action against the company for the ejection. The reason for this rule is well stated in *The City and Suburban Railway of Savannah v. Brans*, 70 Ga. 368: "It is true he (the passenger) had no transfer ticket nor did he know that it was necessary for him to apply to the conductor for one; he had, however, stated to the conductor of the first car he entered, where he wished to go. The conductor ought to have known if it was necessary to have this transfer ticket, to reach his destination and should have furnished it. He made the transfer, however, without doing this, and after the conversation the plaintiff had the right to act upon the assumption that all had been done that was necessary to secure his passage; and seeing that such was his impression, the conductor should have furnished the transfer ticket, without any further request. It would be going very far to require a passenger to specify to the agents of the company what means and appliances were necessary to the accomplishment of the end he had in view; it is the duty of these agents to supply the tickets necessary under such circumstances." See also *Mabry v. City Electric Ry. Co.*, 116 Ga. 624, 42 S. E. 1025. In *Appleby v. St. Paul City Ry. Co.*, 54 Minn. 169, 55 N. W. 1117, it is pointed out that the true

of Montpelier granted to the Consolidated Lighting Company, a corporation, the right to construct and operate an electric railway over various streets in Montpelier. It was a condition of this grant that the fare for riding upon the lines of the grantee within the limits of Montpelier should be five cents, and that the grantee

ground for recovery in such cases is the omission of duty by the company's agent in the car from which the passenger is to be transferred. The court says: "Even though the conductor in ejecting the plaintiff may have done only what was apparently—to him—his duty, it does not follow that the defendant is not responsible therefor. It would be responsible, if by its previous neglect of duty toward the passenger it had justified him in assuming to continue his journey on a car, from which the conductor, in accordance with the regulations of the defendant, should expel him for nonpayment of fare. * * * We are aware that our decision is not in apparent harmony with all of the authorities. Perhaps the seeming conflict of authority has resulted either from differences in the cases presented, or in the different views taken as to the real causes of action relied on. A distinction is to be observed between cases where courts, whether justified by the pleadings or not, have regarded the right of action as resting upon the bare fact of expulsion by a conductor or agent whose duty—to the carrier—required him to expel the passenger, and cases like this where, as we consider, the cause of action is the conduct or neglect of the defendant which results in and also includes the expulsion." See also Consolidated Traction Co. v. Taborn, 58 N. J. L. 1, 32 Atl. 685; Hamilton v. Third Ave. Ry. Co., 53 N. Y. 25, and Stewart v. Metropolitan St. Ry. Co., 20 Misc. Rep. (N. Y.) 605.

On the contrary, as instanced in cases already cited (*supra*, 2. a. Duty of passenger), it is held in Michigan and Massachusetts that the company is not liable for an expulsion caused by refusal to accept a verbal transfer. In Mahoney v. Detroit St. Ry. Co., 93 Mich. 612, 53 N. W. 793, the facts were these: The car had turned to go back before reaching plaintiff's destination. The conductor told him he could get off there and take the next car. He did so, having received no evidence of his right to continue. On refusal to pay another fare he was ejected. Held, that he could not recover for the ejection. The court said: "I have found no authority which holds that a stranger may enter a car of either a railway or a street car company, without any evidence that he has paid his fare, and secure passage by his own statement to the conductor, that he has previously paid it to some other authorized agent. It is the duty of the passenger to secure evidence of such payment or to pay when his fare is demanded. The business of such companies cannot be carried on upon any other basis. * * * It was the plaintiff's reasonable and clear duty to pay his fare and seek redress from the defendant for a violation of his contract." See also Wakefield v. South Boston Ry. Co., 117 Mass. 544.

should give transfer tickets to all of its own lines. June 16, 1896, the selectmen of the town of Berlin granted to the Consolidated Lighting Company the right to construct and operate a street railway over certain streets in that town. It was provided that the fare within the town limits should be five cents, and that the

b. Torn transfers.—Where the transfer slip was inadvertently torn by the conductor giving it to the passenger and was presented in this condition to the second conductor, who refused it and expelled the passenger, it was held that he could recover damages, the conductor being bound to know that the fragment was a portion of a genuine ticket which would have entitled plaintiff to ride over his line. *Rouser v. North Park St. Ry. Co.*, 97 Mich. 565, 56 N. W. 937. On the other hand, it is held in *Woods v. Metropolitan St. Ry. Co.*, 48 Mo. App. 125, that where there was a rule that conductors must collect "proper tickets or transfers" and passenger presented a torn transfer, he could have no recovery for an expulsion, the torn transfer being "improper," and that the conductor need not stop to investigate a passenger's rights aside from the evidence presented by the passenger.

c. Transfer to wrong lines.—A passenger accepting from the first conductor and presenting to the second conductor a transfer to some other line than the one over which the second conductor is running, has no action against the company for expulsion on refusal to pay the fare. *Carpenter v. Washington, etc., R. Co.*, 121 U. S. 474, 7 Sup. Ct. 1002; *Bradshaw v. South Boston R. Co.*, 135 Mass. 407; *Pine v. St. Paul City Ry. Co.*, 50 Minn. 144, 52 N. W. 392. In the latter case the court said: "In order to secure the successful and orderly management of its business, it is proper for the company to adopt and enforce suitable regulations for the transfer of passengers, as enjoined by the ordinances. * * * If the passenger accepts a transfer plainly marked for a particular line, he is not entitled to take a car of another and different line. By accepting such a transfer he so far consents to the regulations of the company in respect to the route and line of cars designated, and the conductors on the several lines would be obliged in obedience to the rules of the company to distinguish between the transfers and require them to be used on the particular lines designated." In this case, however, damages were allowed because the transfer in question was not sufficiently explicit to limit its application to the single line which it was claimed he should have taken. In *Ray v. Cortland & Homer Tract. Co.*, 19 App. Div. (N. Y.) 530, the passenger had been given a check by the conductor, which he said was good for a stop-over until the next car. As a matter of fact these checks were only used to transfer to connecting lines. Plaintiff was unaware of any such rule. Held, that the company was liable for the expulsion of plaintiff, being bound by the unauthorized act of the first conductor.

d. Transfer with time limit erroneously punched.—A street car company may limit the time in which a transfer ticket may be used. *McArthur, J.*,

grantee should give transfers to all of its own lines. The Consolidated Lighting Company, to which the Montpelier and Berlin grants were made as recited, had no authority to construct or operate a street railway in Barre. Afterward, under legislative authority, and in accordance with a previous agreement, the de-

charging a jury, as reported in *Yeatman v. Washington & Georgetown Ry. Co.*, 9 Wash. Law Rep. 804.

Where a passenger is given a transfer check with a time limit punched therein, within which time the transfer must be used on the connecting line, and the wrong time is indicated by the conductor of the first car, so as to cause the refusal of the check by the conductor of the second car, and the consequent expulsion of the passenger, the company is liable to him. *Laird v. Pittsburg Tract. Co.*, 166 Pa. St. 4, 31 Atl. 51; *Perrin v. North Jersey St. Ry. Co.*, 1 St. Ry. Rep. 525, (N. J.) 54 Atl. 799; *Eddy v. Syracuse Rapid Transit Co.*, 50 App. Div. (N. Y.) 109; *O'Rourke v. Street Ry. Co.*, 103 Tenn. 124, 52 S. W. 872. In the latter case the condition "In accepting this transfer passenger agrees that in case of controversy with the conductor about this ticket, and its refusal to pay the regular fare charged and apply at the office of the company for refund of the same within three days," was held to be unreasonable. The court said: "This condition is unreasonable in that it makes the conductor for the time the sole judge of the sufficiency of the ticket, and requires the passenger to pay additional fare though his ticket may be refused without sufficient cause; and further in that it requires the wronged passenger, who so pays, to apply for refund at the office of the company, which must be remote from the houses and business places of most passengers, and then limits the amount to be received by such person to that wrongfully exacted. It puts all of the burden of the controversy upon the wronged passenger, and none upon the wrongdoing company, and thereby makes the just suffer for the unjust."

In *Garrison v. United Ry. & Elec. Co.*, 1 St. Ry. Rep. 267, (Md.) 55 Atl. 371, it is held that there can be no recovery where the transfer is void on its face.

Where there is a condition on the transfer check that the passenger must take the first connecting car, or one leaving the connecting point within a limited time, it is held that this condition must be observed. However, if the passenger is unable to obtain a ride within the time limited, the rule is relaxed to some extent. *Jenkins v. Brooklyn Heights Ry. Co.*, 29 App. Div. (N. Y.) 8. Here the plaintiff received a check to be used in ten minutes. During this time two greatly overcrowded cars passed the connecting point. Plaintiff waited for a third and the conductor of that car refused his transfer on the ground that the time for its use had expired. Held, that the plaintiff was entitled to damages for expulsion, the rule of the company as to this case being arbitrary and illegal. See also *Hanna v. Nassau Elec. Ry. Co.*, 18 App. Div. (N. Y.) 137, and *McMahon v. Third Ave. Ry. Co.*, 47 N. Y. Super. Ct. 282.

fendant company took an assignment of the rights, privileges, and franchises of the Consolidated Lighting Company in respect to the construction and operation of lines of street railway in Mont-

e. Damages.—Exemplary damages are not usually given for expulsion on account of presenting a transfer, invalid through the error of the conductor giving it. However, in *City & Suburban Ry. of Savannah v. Brausa*, 70 Ga. 368, and *Mabry v. City Elec. Ry. Co.*, 116 Ga. 624, 42 S. E. 1025, exemplary damages were given,—in the latter case though no physical injuries had been sustained. See also *Hayter v. Brunswick Traction Co.*, 66 N. J. L. 575, 49 Atl. 714.

Usually compensatory damages only are allowed, on the ground that the expulsion is not malicious but done to obey the rules of the company, and that unless fraud or malice is proven in the act of the first conductor no ground exists for making an "example" by giving exemplary damages. So held in *Vicksburg R. Co. v. Marlett*, 78 Miss. 872, 29 So. 62, where the additional element of insult on the part of the expelling conductor was alleged but not found. This case follows *Pine v. St. Paul City R. Co.*, 50 Minn. 144, 52 N. W. 392. In *Muckle v. Rochester Ry. Co.*, 79 Hun (N. Y.), 32 (38), the court said: "The rule adopted by the courts of this State is such as not to permit the recovery of exemplary damages against the master for the act or negligence of the servant, unless he has authorized his misconduct, or ratified it, or unless the conduct complained of is that of the servant while he is in the service, after his unfitness for it is known to his master." In *Eddy v. Syracuse Rapid Transit Co.*, 50 App. Div. (N. Y.) 109 (113), it is said: "It would not be just to mulct a railroad company in exemplary damages for the first act of misconduct toward passengers by one of its conductors, of previous good character and conduct, and whom it had no reason to believe would be guilty of misconduct. Well-considered precedents preclude the recovery of exemplary damages in such cases, and while public policy requires that the common carrier shall be held liable in compensatory damages for the willful or malicious wrongful acts of its conductors, no public policy demands the extension of the rule to authorize a recovery for exemplary damages when the employer has not been guilty of negligence in employing or retaining the conductor, and has not ratified his wrongful act." See also *Hamilton v. Third Ave. Ry. Co.*, 53 N. Y. 25 (30); *Carr v. Toledo Traction Co.*, 10 Ohio Cir. Dec. 296.

4. In general. a. Ticket produced is conclusive.—There is but one rule that can safely be tolerated with any decent regard to the rights of railroad companies and passengers in general. As between the conductor and passenger and the right of the latter to travel, the ticket produced must be conclusive evidence. *Keen v. Detroit Elec. Ry. Co.*, 123 Mich. 247, 81 N. W. 1084.

b. Notice of change of rules.—Notice of a change of rules regarding transfers should be given by conductors or transfer agents. *Consolidated Tract. Co. v. Laborn*, 58 N. J. L. 1, 32 Atl. 685.

pelier and Berlin, and so succeeded by operation of law to all the obligations of the latter company in respect to fares and transfers. But these obligations were neither diminished nor augmented by the assignment. Later, the city of Montpelier granted to the defendant the right to construct and operate a line of street railway which would connect the lines hereinbefore referred to; and at and before the date of the bringing of this petition the defendant had in operation a line of street railway from within the city of Montpelier through the town of Berlin into the city of Barre, and also a branch line in the city of Montpelier and a branch line in the city of Barre. This last-named grant or franchise contained nothing such that by accepting and acting under it the defendant obligated itself to issue to its Montpelier patrons transfer tickets to its lines in the city of Barre, nor can we find from the evidence taken that the defendant has in any other way become so obligated. None of the rights or obligations of the defendant with respect to its road within the limits of Barre were either directly or indirectly derived from or imposed by the city of Montpelier. Neither the city of Montpelier nor its mayor nor the Montpelier patrons of the defendant's road can complain because the defendant requires of a person riding on its road within the limits of the city of Barre payment of the fare which that city permits it to charge.

No consideration is given to questions not arising upon facts found or conceded, nor to questions unnecessary to a decision of the case.

The petition is dismissed, with costs.

Richmond Traction Co. v. Martin's Adm'x.

(Virginia — Supreme Court of Appeals.)

1. INJURY TO PEDESTRIAN BY COLLISION; INTOXICATION.¹— The plaintiff's intestate attempted to cross the street in front of one of the defendant's cars and was struck and injured, resulting in his death. It appeared that the intestate was intoxicated at the time. The car was proceeding

1. Intoxication as evidence of contributory negligence.— One who voluntarily disables himself by reason of intoxication is held to the same degree of care and prudence for his safety as is required of a sober person.

very slowly. The court added to an instruction to the jury to the effect that if it believed that the plaintiff's decedent was intoxicated at the time of the accident, and that being so intoxicated he attempted to cross the defendant's railway tracks in front of a moving car so close that he could not move beyond the point on the track that he first reached before the car struck him, then the plaintiff cannot recover in the action, the further statement, unless they believed that the defendant by the exercise of ordinary care could have avoided the injury, after the motorman saw, or by the exercise of ordinary care could have seen, the danger in which the plaintiff's decedent had placed himself, in time to have avoided the accident. It was held that the modification of the instruction by the court was erroneous.

2. CONTRIBUTORY NEGLIGENCE; CONCURRENT NEGLIGENCE OF BOTH PARTIES.—

If the negligence of the plaintiff's decedent contributed as an efficient cause to the injury complained of the plaintiff cannot recover. But if the negligence of the defendant was the proximate cause of the injury, and that of the decedent only the remote cause, the plaintiff may recover, notwithstanding her decedent's negligence. But where the negligence of the decedent and the negligence of the defendant were so substantially concurrent that it is impossible to separate the conduct of one from the other, the negligence of the decedent precludes a recovery.

ERROR brought by defendant from judgment for plaintiff. Decided December 9, 1903. Reported 102 Va. 205, 45 S. E. 886.

William L. Royal, for plaintiff in error.

Edgar Allen, Jr., and *L. O. Wendenburg*, for defendant in error.

Opinion by WHITTLE, J.

About 10 o'clock on the night of December 24, 1900, Walter Martin, whose administratrix is the defendant in error here, while in an intoxicated condition, started from the southwest corner of

Smith v. Norfolk & S. R. Co., 114 N. C. 728, 19 S. E. 863; *Johnson v. Louisville & N. R. Co.*, 104 Ala. 241, 16 So. 75, 53 Am. St. Rep. 39. But the fact that a person was intoxicated at the time when he received the injury complained of does not of itself constitute contributory negligence precluding him from recovering damages for such injury unless by such intoxication he was disabled from the exercise of ordinary care and did not use such care. *O'Hagen v. Dillon*, 42 N. Y. Super. Ct. 456. There must be proof that the intoxication actually contributed to the injury. *Houston, etc., Ry. Co. v. Reason*, 61 Tex. 613. And it must have been the proximate cause of the injury received. *Davis v. Oregon, etc., R. Co.*, 8 Ore. 172. See

Seventh and Broad streets, in the city of Richmond, diagonally across Broad street, in a northwesterly direction, for the purpose of taking a mule car to go to his home, on Barton Heights. In crossing the street he had to pass over the double track of the plaintiff in error, the Richmond Traction Company. He crossed the first track in safety, but at the second track, not at a crossing, but between Sixth and Seventh streets, he was struck by, or in some manner drawn under, the front fender of a west-bound car. When discovered he was lying across the southern rail, in front of the

also *Central R. & B. Co. v. Phinazee*, 93 Ga. 488, 21 S. E. 66; *Meyer v. Pacific R. Co.*, 40 Mo. 151; *Ditchett v. Spuyten Duyvil & P. M. R. Co.*, 5 Hun (N. Y.), 165. Contributory negligence resulting from the intoxication of the person injured exonerates the defendant from responsibility for the injury, especially where there is no negligence on his part. *Weeks v. New Orleans, etc., R. Co.*, 32 La. Ann. 615. A man cannot by his voluntary intoxication place himself in a condition whereby he loses such control of his brains and muscles as a man of ordinary prudence and caution, in the full possession of his faculties, would exercise, and thereby contribute to an injury to himself, and then require one ignorant of his condition to recompense him therefor. *Strand v. Chicago, etc., Ry. Co.*, 67 Mich. 380. See also *St. Louis, etc., Ry. Co. v. Wilkerson*, 46 Ark. 513; *Little Rock, etc., Ry. Co. v. Pankhurst*, 36 Ark. 371; *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269; *Southwestern R. Co. v. Hankerson*, 61 Ga. 114; *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177; *Johnson v. Illinois Cent. R. Co.*, 61 Ill. App. 522; *Cramer v. City of Burlington*, 43 Iowa, 315; *Welty v. Indianapolis, etc., R. Co.*, 105 Ind. 55, 4 N. E. 410; *Holland v. West End St. R. Co.*, 155 Mass. 387, 29 N. E. 622; *Yarnell v. St. Louis, etc., Ry. Co.*, 75 Mo. 575; *Butler v. Steinway R. Co.*, 87 Hun (N. Y.), 10, 33 N. Y. Supp. 845; *Fisher v. W. Va. & P. R. Co.*, 39 W. Va. 366, 19 S. E. 578, 23 L. R. A. 758.

One somewhat intoxicated, but able to walk, is not, as matter of law, guilty of contributory negligence in attempting to cross a street railway track in front of a cable car, which is standing still on the track when he steps thereon. *West Chicago St. Ry. Co. v. Ranstead*, 70 Ill. App. 111.

A person who lay near a street railway track in a drunken stupor, and threw his feet over the nearest rail, so that they were crushed by a passing car, may not recover of the company when the evidence shows that the motorman could not have stopped the car coming at the usual rate of speed before reaching the plaintiff, had an effort to stop been made immediately after the plaintiff's feet were visible; and this is so although the conductor of another car saw the plaintiff before he had thrown his feet upon the track and reported that he was dangerously near the rail, and a man sent from the barn three blocks away to remove the plaintiff was unable to arrive before the injury. *Kramer v. New Orleans, etc., R. Co.*, 51 La. Ann. 1689, 26 So. 411. But see *Werner v. Citizens' R. Co.*, 81 Mo. 368.

wheel guard, and was taken out in an unconscious condition, and carried to the city almshouse, where he died the next morning.

On the night of the accident, Broad street was thronged with people, and the car was moving at an unusually slow rate of speed — so slow, indeed, that it could be stopped within a few inches — and it was stopped before the front wheels reached Martin's person. After stopping on the east side of Seventh street, the car passed over to the west side, where it was again stopped for the purpose of discharging and taking on passengers, and had proceeded only a few feet from the latter point when the accident occurred.

As to just how it happened, the evidence is conflicting. According to the testimony of some of the plaintiff's witnesses, the car had started up Broad street, and just as Martin stepped across the southern rail the fender struck him, and he fell, and it passed over him. Another witness for the plaintiff testified that the car was stationary at the time Martin attempted to cross the track a few feet in front of it, when it started off very slowly, and the collision occurred. Upon cross-examination, however, the witness stated that from where he was standing he could not discern whether Martin was between the rails, or on the outside of the southern rail, when the car started. On the other hand, the testimony of the defendant's witnesses is that Martin was attempting to board the moving car from the left side at the forward end when the accident happened. On the left side of the car, front and rear, there are closed iron gates to prevent persons from entering the vestibules on that side; the proper point of ingress and egress for passengers being the rear entrance to the vestibule, on the right side of the car. There was also evidence tending to show that the motorman at the time of the collision was looking in the direction of the southeast corner of Broad and Seventh streets, where a crowd of people had congregated, some of whom were ringing cowbells and exploding firecrackers. He testified that he was looking ahead on the track, but did not see Martin until after the collision.

The defendant in error recovered a verdict and judgment against the plaintiff in error in the law and equity court of the city of Richmond.

The assignment of error chiefly relied on to reverse that judg-

ment is the refusal of the trial court to give defendant's instruction "A" in the form in which it was offered, and the modification of the instruction by the court. Instruction "A" is as follows:

"If the jury believe from the evidence that the plaintiff's decedent, on the evening when he met with the accident that resulted in his death, was intoxicated from drink, and that, being so intoxicated, he attempted to cross defendant's railway track in front of a moving car that was approaching him, so close to said car that he could not move beyond the point on the track that he first reached before the car struck him, then they are instructed that the plaintiff cannot recover in this action."

The addendum by the court is:

"Unless they believe further from the evidence that the defendant, by the exercise of ordinary care, could have avoided inflicting on him the injury which resulted in his death, after the motorman saw, or by the exercise of ordinary care could have seen, the danger in which the plaintiff's decedent had placed himself, in time to have avoided the accident."

It may be remarked that the principle intended to be inculcated by the addendum to the instruction was already covered by plaintiff's second instruction.

Two theories were propounded by the evidence: (1) That at the time Martin attempted to cross the northern track of the defendant's railway the car in question was at a standstill, and was subsequently set in motion, and the collision occurred; and (2) that, while the car was already in motion, Martin stepped on the track immediately in front of it, and was struck by the fender.

It is not clear that the evidence relied on to sustain the first theory was sufficient to have warranted the court in basing an instruction upon it, because, as has been observed, the witness was unable to state positively whether the car was stationary or in motion when Martin stepped upon the track in front of it. Assuming, however, the sufficiency of the evidence on that point, the law of the case in that aspect had already been submitted to the jury. The distinct purpose of the defendant's instruction which the court modified was to present to the jury the other theory of the case. The instruction correctly expounded the law, and the evidence both of the plaintiff and defendant tended to sustain it. The effect of the ruling of the court with respect to the instruction was to withdraw from the consideration of the jury the

second theory, however disposed they might have been to adopt it, and to direct their attention solely to the plaintiff's view of the evidence. This was plainly erroneous, and operated disastrously to the defendant.

The well-known rule in this class of cases is that a plaintiff seeking to recover damages for an injury caused by the negligence of the defendant must himself be free from negligence, and, if it appears that his negligence has contributed as an efficient cause to the injury of which he complains, the court will not undertake to balance the negligence of the respective parties for the purpose of determining which was most at fault. The law recognizes no gradations of fault in such case, and where both parties have been guilty of negligence, as a general rule, there can be no recovery. There is really no distinction between negligence in the plaintiff and negligence in the defendant, except that the negligence of the former is called "contributory negligence."

The general rule adverted to is subject, however, to the qualification that where the negligence of the defendant is the proximate cause of the injury, and that of the plaintiff only the remote cause, the plaintiff may recover, notwithstanding his negligence; the doctrine in that respect being that the law regards the immediate or proximate cause which directly produces the injury, and not the remote cause which may have antecedently contributed to it. From that principle arises the well-established exception to the general rule, that if, after the defendant knew, or, in the exercise of ordinary care, ought to have known, of the negligence of the plaintiff, it could have avoided the accident, but failed to do so, the plaintiff can recover. In such case the subsequent negligence of the defendant in failing to exercise ordinary care to avoid injuring the plaintiff becomes the immediate or proximate and efficient cause of the accident, which intervenes between the accident and the more remote negligence of the plaintiff.

It was this principle that was invoked by the plaintiff upon the first theory of the case, and applied by the court in plaintiff's instruction and in the modified instruction of the defendant. But the second theory presented a case where the proximate and efficient cause of the accident involved the concurrent negligence of both plaintiff and defendant, unbroken by any efficient supervening cause, and to such case the exception referred to obviously has no

application. Upon that theory, the act of Martin and the conduct of the motorman were so substantially concurrent that it was impossible to separate the conduct of the former from the injury itself. *Rider v. Syracuse Rapid Transit Ry. Co.* (N. Y.), 63 N. E. 836, 58 L. R. A. 125. The doctrine under discussion is fundamental and elementary, and has been expounded time and again by this and other courts, from *Davis v. Mann*, 10 M. & W. 545, decided in the year 1842, down to the present time.

As observed, the error of the trial court consisted in instructing the jury on one theory of the case, and ignoring the other theory, which, if sustained, would have entitled the defendant to a verdict. For these reasons, the judgment complained of must be reversed, and the case remanded for a new trial to be had not in conflict with this opinion.

BUCHANAN, J., absent.

Richmond Traction Co. v. Williams.

(Virginia — Supreme Court of Appeals.)

1. INJURY TO PASSENGER ALIGHTING FROM CAR;¹ DEGREE OF CARE TO BE EXERCISED BY COMPANY.— The plaintiff, a passenger on one of the defendant's cars, attempted to alight from the car after it had stopped before crossing steam railroad tracks. It appeared that the place where the car stopped was a regular stopping place for passengers to alight. Before the plaintiff had alighted the car suddenly started and threw her to the ground. The car started upon the signal of the conductor, who had left the car for the purpose of ascertaining whether his car could cross the railroad tracks without danger of collision with the steam cars. The court instructed the jury that it was the duty of street railway companies to use extraordinary care and caution to see that passengers are not injured in getting on or off their cars, and that it was the duty of the defendant in this case, through its servants and employees, to take due and proper precaution to see that no one was in the act of alighting before moving the car ahead after it had stopped at a regular point for stopping. This instruction was held to clearly present the rule of law applicable to the case.

1. As to injuries to passengers alighting from car, see note to *Champagne v. La Crosse City Ry. Co.*, *post*, p. 988.

2. CONTRIBUTORY NEGLIGENCE UPON PART OF PASSENGER ATTEMPTING TO ALIGHT.— A passenger on a street car is guilty of negligence in attempting to get off from the car while it is in motion. But if she retained her seat until the car had fully stopped, and reached the platform before the car was started forward, and while she was in the act of alighting, she was thrown to the ground and injured by the sudden starting of the car, her conduct cannot be considered as constituting contributory negligence.

ERROR brought by defendant from judgment for plaintiff. Decided January 14, 1904. Reported 102 Va. 253, 46 S. E. 292.

William L. Royall, for plaintiff in error.

Edgar Allan, Jr., for defendant in error.

Opinion by CARDWELL, J.

The defendant in error, Mrs. S. M. Williams, brought her action in the law and equity court of Richmond city, and recovered judgment against the plaintiff in error, the Richmond Traction Company, for the sum of \$500, with interest from the 24th day of April, 1901, as damages for injuries sustained because of the negligence of the defendant, and we are asked to reverse this judgment on the grounds (1) that the court below misdirected the jury as to the law; and (2) because the verdict is contrary to the law and the evidence. The defendant below, plaintiff in error here, owns and operates an electric street railway in the city of Richmond, and one of its tracks lies in Cary street, running east and west; and it crosses at right angles Belvidere street, on which the Richmond, Fredericksburg & Potomac steam railroad has a track, upon which steam cars are operated.

An ordinance of the city of Richmond relative to the conduct of street railways operated within the city contains the provision that, "at every point of intersection of either street car line with a steam railroad, the street car company's cars shall come to a full stop before crossing the tracks of the steam road, and the steam road in each case shall have the right of way," etc.; and one of the printed rules of the plaintiff in error reads as follows:

"(16) Steam Railroad Crossings.—Motormen must bring their cars to a full stop, not nearer than twenty-five feet to the nearest track—meaning the nearest track of the steam railroad. The motorman must not proceed with

his car until the conductor has gone ahead onto the steam railroad track and looked both ways and given a signal to start. The motorman will also observe the utmost watchfulness for approaching trains, and should, in his judgment, danger be imminent from any source he will refuse to start his car until the crossing is clear and free from all danger. When the conductor has gone ahead of car, before starting, the motorman will look back and see that there is no one getting on or off the car. * * *

Another of the plaintiff in error's rules provides: "(39) Approaching Street and Railway Crossings.—Approach all street and railway crossings with care, and your car under perfect control; cross the street before stopping."

On the 24th day of April, 1901, the defendant in error was a passenger on one of the cars of the plaintiff in error, having gotten on the car at First and Broad streets, and was going to her home, on Belvidere street, near Cary street. When the car reached the east side of Belvidere street, it came to a full stop, in accordance with the rules of the plaintiff in error, and the conductor went forward to view the steam railroad tracks, to ascertain whether his car could proceed farther without danger of collision with the steam cars; and, observing the approach of no steam cars, he signaled the motorman to go forward. In the meantime the defendant in error had left her seat in the car, and was in the act of alighting upon the street, when the car was suddenly started with a severe jerk, throwing her upon the street, causing her the injuries for which this suit was brought. Her contention at the trial was that by custom the place at which she attempted to leave the car had become a regular stopping place for passengers to alight, and that before approaching that point she signaled to the conductor with her hand to stop the car for her to alight, and she supposed he understood and agreed to her signal, whereupon she got up and walked out upon the back platform, supposing that the conductor would be there to assist her off, but when she got upon the rear platform she found that the conductor had gone to the steam road, and, reaching it, and without looking back, he signaled the motorman with his hand to come on, and, the motorman applying the electricity, the car gave a sudden jerk, that threw her to the ground and injured her.

On the other hand, the theory of plaintiff in error was that the defendant in error either attempted to get off the car while moving,

thereby contributing to her own injuries, or that, after reaching the rear platform at the steps, instead of getting off of the car, she delayed, and thereby lost her opportunity to get off before the car started. In other words, the contention of the defendant in error was that she received her injuries by reason of the neglect of the plaintiff in error to perform its duty to her, under the law, as a passenger, and in violation of its own rules and regulations, while the theory of the plaintiff in error was that the defendant in error, by her own negligence, contributed to her injuries, whereby she was barred of any recovery in this action.

The defendant in error at the trial asked for two instructions, which the court gave. The second relates to the measure of damages in such an action, and is free from objection, and will, therefore, not be further noticed. The first instruction is as follows:

"The court instructs the jury that it is the duty of common carriers, such as street railway companies, to use extraordinary care and caution to see that passengers are not injured in getting on or off their cars, and that it was the duty of the defendant company, their servants and employees, to take due and proper precaution to see that no one was in the act of alighting before moving their car ahead after the same had been stopped at a regular point for stopping; and if the jury shall believe from the evidence that the plaintiff, Mrs. Williams, without negligence on her part, was in the act of alighting from said car, and that the defendant company, their servants or employees, failed to perform their duty in this behalf, and by reason thereof the plaintiff was injured, then the jury shall find for the plaintiff."

This instruction, we think, was clearly right, as it presented the rule of law which this court has frequently laid down with reference to the liability of a street car company to use the utmost care and diligence for the safety of passengers. The most recent case on the subject is that of *N. & A. Ter. Co. v. Morris' Adm'r* (Va.), 44 S. E. 719. The evidence tended to show that the defendant in error in this case was seeking to leave the car at a point which, by custom, known to the plaintiff in error, had become a regular stopping place where passengers left the car, and she was on this occasion, as she had frequently done before, alighting from the car near her home.

Plaintiff in error asked for five instructions, marked "A," "B," "C," "D," and "E," of which the court refused to give "D" and "E," and modified "A," "B," and "C;" the court giving the instructions as modified as its own instructions, numbering them Nos. 3, 4, and 5. Instruction "A," modified, was as follows:

"If the jury believe from the evidence that the plaintiff undertook to get off of defendant's car while it was in motion, she is guilty of contributory negligence, and cannot recover in this action."

And in lieu of this instruction the court gave the following:

"If the jury believe from the evidence that the plaintiff undertook to get off the defendant's car while it was in motion, she is guilty of contributory negligence, and cannot recover in this action; but if the jury believe from the evidence that the plaintiff retained her seat until the car had fully stopped, and reached the platform before the car was started forward, and that then, while she was in the act of alighting, by the sudden starting of the car, she was thrown to the ground and injured, her conduct cannot be considered as constituting contributory negligence on her part."

If it be conceded that a passenger on a street car is guilty of negligence by leaving his seat while the car is in motion, as to which we express no opinion, instruction "A" contained a mere abstract proposition of law, which was calculated to mislead the jury in this case; and the court was clearly right in qualifying it by adding thereto, "but if the jury believe from the evidence that the plaintiff retained her seat until the car had fully stopped, and reached the platform before the car was started forward, and that then, while she was in the act of alighting, by the sudden starting of the car she was thrown to the ground and injured, her conduct cannot be considered as constituting contributory negligence on her part." We are further of opinion that this instruction, as given by the court, together with its fourth and fifth instructions, sufficiently covered every proposition of law contended for in the instructions asked for by the plaintiff in error which were refused. The instructions as given submitted more clearly to the jury the issues presented by the testimony in the case, and it is not error to refuse instructions when the propositions of law, although correctly stated therein, are sufficiently covered by other instructions which are granted. *N. & W. Ry. Co. v. Tanner*, 100 Va. 379, 41 S. E. 721.

We shall not attempt to review in detail the evidence in the case. This is a very different case from that of a trespasser, a licensee, or of a person crossing a street, with rights only equal to those of a railroad company. Here it was a passenger toward whom the railroad owed the highest diligence. While the defendant in error may have known that the regular stopping point at which to take on or put off passengers was on the opposite side of Belvidere street, the evidence was ample to show that by custom, well known to plaintiff in error, its cars had been stopping on the east side of Belvidere street, at which point passengers constantly got off. The jury, therefore, was well warranted in finding that the defendant in error was not guilty of negligence merely by the fact that she attempted to leave the car at that point after it had come to a full stop. It was the duty of the employees of the company to be on the alert to see that passengers seeking to alight from the car at that point were not put in peril by doing so, when, by the exercise of ordinary care on the part of these employees, danger to them might be averted. Whether these employees were negligent in the performance of these duties, as well as the question whether or not the defendant in error was guilty of negligence contributing with that of the plaintiff in error, and causing her injury, was a question of fact for the jury; and, these questions having been submitted fairly to them by the instructions given by the court, we cannot say that the verdict of the jury is without evidence or against the evidence.

Upon the whole case we are of opinion that the judgment should be affirmed.

BUCHANAN. J., absent.

Northington v. Norfolk Railway & Light Co.

(Virginia — Supreme Court of Appeals.)

INJURY TO PASSENGER BOARDING CAR BY SUDDEN START OF CAR; CONFLICTING EVIDENCE.—The plaintiff alleged that as she was in the act of boarding one of the defendant's cars the car was suddenly and prematurely started, and she was thrown to the ground and injured. The defendant's theory was that the plaintiff had already boarded the car and jumped off after it had gotten under way. The ascertainment of the place where the plaintiff boarded the car and of the place where

the accident occurred was, therefore, of controlling importance. The plaintiff's own testimony in respect to this question conflicted with that of other witnesses called in her behalf. It was held that, such evidence being contradictory, a verdict for the plaintiff was properly set aside as unsupported by the evidence.

Error brought by plaintiff from a judgment in favor of defendant. Decided February 10, 1904. Reported 102 Va. 446, 46 S. E. 475.

Miller & Coleman, for plaintiff.

Richard B. Tunstall, for defendant.

Opinion by WHITTLE, J.

The plaintiff in error, Anna Northington, brings this case here to review a judgment of the Court of Law and Chancery of the city of Norfolk, setting aside the verdict of a jury awarding damages in her behalf against the defendant in error, the Norfolk Railway & Light Company, in an action for personal injuries.

The status of the case is as follows: There were two trials in the court below. At the first trial the jury returned a verdict in favor of the plaintiff, which, upon motion of the defendant, was set aside as contrary to the law and evidence, and a new trial granted. At the second trial the plaintiff declined to introduce any testimony, and, a jury having been waived, the court rendered judgment for the defendant.

In such case, by statute, the rule of decision is that this court must "look first to the evidence and proceedings on the first trial, and if it discovers that the trial court erred in setting aside the verdict on that trial, it shall set aside and annul all proceedings subsequent to said verdict and enter judgment thereon." Acts 1891-92, p. 962; *Wood v. American Nat. Bank*, 100 Va. 306, 309, 40 S. E. 931.

The declaration alleges that while the plaintiff was in the act of boarding one of the defendant's cars at the intersection of Church and Henry streets, in the city of Norfolk, the car was suddenly and prematurely started, and the plaintiff was thrown to the ground with such violence that her leg was broken at or near the ankle.

The defendant denied liability upon two grounds: (1) Because the accident was caused by the negligence of the plaintiff in

jumping from a car while in motion; and (2) that, in consideration of the payment of \$50 and the doctor's bill for medical services rendered the plaintiff, she had acknowledged satisfaction, and executed and delivered a release of all claims and demands against the defendant on account of the injury.

Upon the question of negligence, the witnesses who testified on behalf of the plaintiff were the plaintiff herself, Mary Dean, her sister, Godfrey Watkins, and George Williams. The accident happened on Church street, which runs north and south, at or near the corner of Henry street, which runs east and west; and the case made by the declaration and the contention of the plaintiff is that she was thrown off "just as soon as the car started," while the competing theory of the defendant is that plaintiff jumped off the car after it had gotten under way, and while in motion. The ascertainment of the exact point at which the accident occurred is, therefore, of controlling importance.

Plaintiff testified that the car stopped to discharge and receive passengers at the southern corner of Henry street on Church street, and that she fell at the intersection of these two streets as soon as the car started, which, of course, fixes the place at which she fell as the southern corner of Henry street; and the testimony of Mary Dean is substantially to the same effect. Her witness, Godfrey Watkins, on the contrary, says explicitly that she was thrown from the car north of the northern corner of Henry street. George Williams, also, after making contradictory statements, finally, on cross-examination, settles upon the northern corner of Henry street as the point at which plaintiff fell. Thus the plaintiff and her sister were contradicted by two of her own witnesses on a most material point in the case, for, if her version of the affair be true — that she was thrown off at once, by the car starting prematurely — then the place where she fell could not have been north of Henry street, at which place the car was unquestionably in motion. Upon that issue she was also contradicted by four of the defendant's witnesses — one of them the conductor of a trailer car attached to the street car, and three of them disinterested passengers — all of whom testified that the car had crossed Henry street and was in motion when plaintiff jumped off and received the injury. It seems that Mary Dean had intended to board the car, but failed to do so; and the supposition is that, when plaintiff discovered

that her sister had been left behind, she jumped off in order to join her.

It also appears that in the receipt executed by plaintiff to the defendant for \$50 in cash and the amount of the doctor's bill, which were agreed to be accepted in full settlement and release of all claim to damages against the defendant, she admitted that the injury was the result of her stepping from a moving car. It further appears from a contemporaneous report of the accident made by the conductor of the street car (produced on cross-examination of one of defendant's witnesses) that the car was running at the rate of six or eight miles an hour when the plaintiff was injured.

In the case of *Preston v. Otey*, 88 Va. 491, 14 S. E. 68, it was held that a party's admission was so inconsistent with his contention that a verdict in his favor ought to be set aside as against the evidence. And the court said in the case of *N. & W. R. Co. v. Poole*, 100 Va. 148, 40 S. E. 627, at page 153, 100 Va., page 629, 40 S. E.: "Where damages are claimed for injuries which may have resulted from one of two causes, for one of which the defendant is responsible and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause. And he must also fail if it is just as probable that the damages were caused by the one as by the other, since the plaintiff is bound to make out his case by a preponderance of the evidence." *Searles v. Manhattan Ry. Co.*, 101 N. Y. 661, 5 N. E. 66; 1 Shearm. & Redf. Neg., § 57; *C. & O. Ry. Co. v. Sparrow*, 98 Va. 640, 641, 37 S. E. 302.

The rule in this class of cases is that the evidence must show more than a probability of actionable negligence on the part of the defendant. Nevertheless the admission of the plaintiff, and the testimony of two of her witnesses, Godfrey Watkins and George Williams, are so opposed to her own testimony and theory of the cause of the accident that it is impossible for the court to determine with any degree of reliability which should be accepted as true. It is obvious, therefore, that any conclusion that might be reached in the case favorable to plaintiff would not be warranted by any certain evidence, but would be based upon conjecture merely.

Upon the first issue, in view of the contradictory, confused, and inconclusive character of the testimony of the plaintiff and her witnesses without regard to the countervailing evidence of the defendant, the verdict of the jury was a plain deviation from justice and the right of the case. As remarked, there was no reliable, substantial evidence to support the verdict, and the action of the court in setting it aside was without error.

The remaining ground of defense, as stated, is that plaintiff had received the sum of \$50, and payment of the doctor's bill, in satisfaction of all claims and demands against the defendant.

The settlement was made on July 26, 1901, and the action was not brought until April of the ensuing year. Plaintiff received the money and executed the release without any suggestion that she was a minor at that time. That contention was made for the first time when the action was instituted. While the evidence to sustain that issue is based upon the memory of unintelligent witnesses and is unsatisfactory, the view already taken by the court of the other branch of the case renders a consideration of the second ground of defense unnecessary.

Upon the whole case, the judgment complained of is without error, and must be affirmed.

Richmond Passenger & Power Co. v. Gordon.

(Virginia — Supreme Court of Appeals.)

1. COLLISION WITH VEHICLE; DUTY OF MOTORMAN TO AVOID ACCIDENT.¹—

The plaintiff was injured by a collision of the vehicle in which he was riding with one of the defendant's cars, at a street railway crossing. There was evidence tending to show that if the motorman had been exercising ordinary care as his car approached the crossing he could have seen the plaintiff's peril in time to have prevented the injury. An instruction to the effect that if the jury find that the plaintiff was guilty of want of reasonable and ordinary care in attempting to cross the tracks under the circumstances referred to, then he is not entitled

1. As to exercise of due care by motorman to avoid collision with persons and vehicles on or near tracks, see cases cited in note to *Harrington v. Los Angeles Ry. Co.*, *ante*, p. 23.

to recover, unless they believe that the motorman could have avoided the accident by the use of ordinary care, after he saw, or, by the use of ordinary care, might have seen, that the plaintiff was on the track or very near thereto and driving toward the same, and was in danger of being struck by the car, was sustained.

2. DUTIES OF STREET RAILWAY COMPANY AS TO PERSONS ON TRACK.—Where a street railway company knows or has reason to believe that persons are likely to be on their tracks at a particular point, such company owes two duties to such persons: 1. To keep a lookout in approaching such point. 2. To avoid injury when it sees such persons in peril, if it can be done in the exercise of ordinary care. A failure in the performance of these duties imposes a liability upon the company for the resulting injuries.

3. CONCURRENT NEGLIGENCE OF PLAINTIFF AND DEFENDANT; INSTRUCTION.—If the proximate cause of the injury was the concurrent negligence of the plaintiff and defendant, the contributory negligence of the plaintiff precludes his recovery. A refusal to instruct the jury to the effect that if they believe from the evidence that the accident was caused by the concurrent negligence of the motorman and of the plaintiff, due to each failing to keep a proper lookout, they must find for the defendant, was reversible error.

4. INSTRUCTION AS TO DUTY TO LOOK AND LISTEN.²—An instruction in the following language, "While, generally speaking, one who is about to cross a street railway should both look and listen for cars, this is not an inflexible rule, nor is it to be enforced with any such strictness as in the case of an ordinary steam railroad; it is not negligence as a matter of law to omit to do so; the question is whether men of ordinary prudence, exercising ordinary care and prudence, would have thought it unnecessary to do so," is a correct statement of the rule as to the degree of ordinary care to be used by persons in approaching a street car crossing.

APPEAL by defendant from a judgment for plaintiff. Decided March 10, 1904.
Reported 102 Va. 498, 46 S. E. 772.

Henry Taylor, Jr., for appellant.

Meredith & Cocke, for appellee.

Opinion by BUCHANAN, J.

This action was instituted by John W. Gordon, to recover damages for injuries done him at a street crossing in the city of Rich-

2. As to duty to look and listen, see cases cited in note to *Chicago City Ry. Co. v. O'Donnell*, *ante*, p. 172.

mond by the alleged negligent running of an electric street railway car operated by the Richmond Passenger & Power Company.

Upon the trial of the cause the plaintiff asked for eight instructions, and the defendant for three. All the instructions asked for were given as asked, or with such modifications as the court saw proper to make. No objections are made here to instructions numbered 2, 3, 4, 5, and 8 given for the plaintiff, nor to instruction "a" given for the defendant. The assignments of error chiefly relied on are the giving of the plaintiff's instruction No. 7, and the refusal of the court to give the defendant's instructions "b" and "c" as asked, and in giving them as modified by the court.

The following is a copy of instruction No. 7:

"If the jury find that the plaintiff was guilty of want of reasonable and ordinary care in attempting to cross the tracks of the defendant under the circumstances referred to, then he is not entitled to recover, unless they believe from the evidence that the motorman could have avoided the accident by the use of ordinary care after he saw, or by the use of ordinary care might have seen, that the plaintiff was on the track, or very near thereto, and driving toward the same, and was in danger of being struck by the car; and, if they shall so believe, then they must find for the plaintiff."

The objection made to that instruction is, first, that there was no evidence to show that the motorman could have avoided the accident by the exercise of ordinary care after he saw the plaintiff's peril; and, second, that the proposition that they must find for the plaintiff if the jury believed that the motorman might, by the exercise of ordinary care, have seen the plaintiff's peril, and avoided the accident, is not law.

There is no evidence that after the motorman saw the plaintiff's danger he could have avoided the accident; but there is evidence tending to prove that, if the motorman had been exercising ordinary care as his car approached the crossing, he could have seen the plaintiff's peril in time to have prevented the injury. There is evidence tending to show that the plaintiff, as he drove along Floyd avenue toward the crossing where that avenue intersects Harrison or Beech street, stopped or checked the one-horse vehicle in which he, his wife, and son were riding about forty feet from the crossing at the time a north-bound street car crossed Floyd avenue, and that he then proceeded toward the crossing;

that the north-bound car passed the car going south, which did the injury, from sixty to seventy-five feet north of Floyd avenue; that from that point there was nothing to prevent the motorman on the south-bound car from seeing the plaintiff's vehicle as it approached the street car track; that from the point where the cars passed each other to the point where the plaintiff's vehicle was struck was 100 feet or more; that a car running at the rate of six or seven miles an hour, as the motorman said his car was running, could, under favorable circumstances, be stopped in about a car length, which was shown to be about thirty-five feet, and that the car was actually stopped in about forty-five feet after the motorman saw the plaintiff's vehicle. This evidence was sufficient to justify the court in giving the instruction in question, under a long line of decisions of this court.

In the case of *R. & D. R. Co. v. Anderson*, 31 Gratt. 812, 31 Am. Rep. 750, decided a quarter of a century ago, it was held, Judge Burks delivering the opinion of the court, that, though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse the defendant. To sustain the conclusion reached in that case the learned judge approved and followed the decision of the House of Lords in the case of *Radley v. London, etc., Ry. Co.*, 1 App. Cas. (Law Rep. 1875-76), 754, 759, which cites and affirms *Davies v. Mann*, 10 M. & W. 545, and *Tuff v. Warman*, 5 C. B. (N. S.) 573.

In the case of *Marks, etc. v. Petersburg R. Co.*, 88 Va. 1, 10, 13 S. E. 299, which was an action for damages for causing the death of a traveler at a street crossing by the defendant railroad company's cars, it was said by Judge Lewis, in discussing the subject of contributory negligence:

"If a person attempts to cross a railroad at a highway crossing without using his senses of sight and hearing, even though the company be negligent, the law, as well as common prudence, condemns his act as careless. But this is a mere presumption, which may be repelled by evidence showing that the case is within one or more of the exceptions to the general rule before mentioned. In the absence of such evidence, however, the contributory negligence of such person, when injured, will preclude a recovery, unless the com-

pany might, by the exercise of ordinary care on its part, have avoided the consequences of the plaintiff's negligence." "This qualification of the doctrine of contributory negligence," he continues, "is laid down in the leading case of *Tuff v. Warman*, 2 C. B. (N. S.) 740, and so often recognized by this court." After citing a number of the decisions of this court, he adds: "Applying this test to the present case, we are of opinion that the plaintiff is not entitled to recover, for it is manifest that ordinary care on the part of the defendant could not have discovered the negligence of the deceased in time to avoid the accident."

In the case of *Seaboard, etc., R. Co. v. Joyner*, 92 Va. 354, 23 S. E. 773, this court, in considering the question of the duty of a railroad company to avoid injuring a trespasser, said:

"The law upon this subject is, we think, properly stated in the ninety-ninth section of *Shearman & Redfield on the Law of Negligence* (4th ed.), where it is said that: 'The plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was proximately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man on his guard, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the defendant should actually know of the danger to which the plaintiff is exposed. It is enough if he have sufficient notice or belief to put a prudent man on the alert, and he does not take such precautions as a prudent man would take under similar notice or belief.'"

To the same effect is *Tucker's case*, in 92 Va. 549, 24 S. E. 229, and *Dunnaway's*, in 93 Va. 29, 36, 37, 24 S. E. 698.

In the case of *B. & O. R. Co. v. Few's Exr.*, 94 Va. 82, 89, 26 S. E. 406, it was held that a railroad company is liable for a personal injury inflicted on a traveler at a public crossing if its agents or servants in charge of a moving train saw him in a position of danger, or by the use of diligence might have seen him, and failed to stop the train, and prevent it from injuring him.

In *Blankenship's case*, 94 Va. 449, 457, 27 S. E. 20, 22, it was said in discussing this question and explaining what was meant by certain language used in *Dunnaway's case*, *supra*, that:

"By the use of the language 'when the trespasser is discovered, or by ordinary care and caution might have been discovered,' it was not intended to say that under ordinary conditions it was the duty of the railroad company to keep a lookout for trespassers (for the question was not involved in that case), but to declare, where it had such notice or belief, that some one might be in danger as ought to put a prudent man on the alert, it became the company's duty to be on the lookout, and it might be held responsible for injuries

done a trespasser under such circumstances, not only after his danger was discovered, but where, by ordinary care and caution, it might have been discovered, unless it did all that could be done to avoid injuring him consistently with its higher duties to others."

In *Washington, etc., R. Co. v. Lacy*, 94 Va. 460, 476, 26 S. E. 834, 839, which was also a street crossing case, it was said, after declaring what the duty of a traveler was in approaching a street crossing over which a steam railroad was operated, that: "If he fails to use these necessary precautions, and injury ensues, he cannot recover, unless the defendant company, by the exercise of ordinary care and diligence, might have prevented the injury after it discovered, or ought to have discovered, his peril."

In *C. & O. Ry. Co. v. Rodgers*, 100 Va. 324, 325, 41 S. E. 732, where the party injured was walking on the defendant company's track at a point where persons were accustomed to walk, it was held that in such a case a defendant was liable for the injury inflicted upon the plaintiff, notwithstanding the latter's negligence, if, by the exercise of reasonable care, the plaintiff's danger could have been discovered in time to save him.

Richmond, P. & P. Co. v. Steger, 101 Va. —, 43 S. E. 612, and *Richmond Traction Co. v. Martin's Admx.*, 102 Va. —, 45 S. E. 886, are to the same effect. In the last-named case, decided at the December term, 1903, it was said by Judge Whittle, speaking for the court, that:

"The well-known rule in this class of cases is that a plaintiff seeking to recover damages for an injury caused by the negligence of the defendant must himself be free from negligence, and, if it appears that his negligence has contributed as an efficient cause to the injury of which he complains, the court will not undertake to balance the negligence of the respective parties for the purpose of determining which was most at fault. The law recognizes no gradations of fault in such case, and, where both parties have been guilty of negligence, as a general rule, there can be no recovery. There is really no distinction between negligence in the plaintiff and negligence in the defendant, except that the negligence of the former is called 'contributory negligence.'

"The general rule adverted to is subject, however, to the qualification that, where the negligence of the defendant is the proximate cause of the injury, and that of the plaintiff only the remote cause, the plaintiff may recover, notwithstanding his negligence; the doctrine in that respect being that the law regards the immediate or proximate cause which directly produces the injury, and not the remote cause which may have antecedently contributed

to it. From that principle arises the well-established exception to the general rule that if, after the defendant knew, or, in the exercise of ordinary care, ought to have known, of the negligence of the plaintiff, it could have avoided the accident, but failed to do so, the plaintiff can recover. In such case the subsequent negligence of the defendant in failing to exercise ordinary care to avoid injuring the plaintiff becomes the immediate or proximate and efficient cause of the accident, which intervenes between the accident and the more remote negligence of the plaintiff."

These cases establish the doctrine that, where a railroad company or a street railway company knows or has reason to believe that persons are likely to be on their tracks at a particular point, such company owes two duties to such persons: First, to keep a lookout in approaching such point; and, second, to avoid injury when it sees such persons in peril, if it can be done by the exercise of ordinary care. And if it fails to keep such lookout, and thereby fails to see such persons' peril, and inflicts injury, it cannot escape liability on that ground, but its liability will depend not upon what it actually knew, but upon what it would have known if it had performed its duty in keeping a proper lookout. And this seems to be the rule generally.

Shearman & Redfield, in their work on Negligence (§ 484, 5th ed.), say that:

"The rule that a plaintiff is as a matter of law negligent if he fails to see what he was bound to look for and ought to have seen, is rigidly enforced; and the same rule must, in common justice, be applied to the defendant. And in fact it actually is in almost every court where the question is squarely presented." And in section 485c they say that: "The operator of a street car, especially if it is impelled by cable or electric power, is bound to keep a constant watch for persons and vehicles on the street; and although he is not bound to anticipate that foot passengers will attempt to cross otherwise than at regular crossings, and, therefore, need not maintain quite the same degree of vigilance elsewhere, he is always responsible for failing to see even persons crossing at other places, if he would have seen them, had he been in the exercise of ordinary care. The rule exempting railroads from responsibility where trainmen do not in fact see a person on the track * * * certainly applies only against trespassers, and, therefore, does not apply to city streets or street cars."

The court did not err in giving the instruction in question.

Instruction "b," as offered, is as follows:

"The court further instructs the jury that if they believe from the evidence that John W. Gordon slowed down his horse when about forty feet from the

track to allow the north-bound car to pass, and shall further believe from the evidence that after the north-bound car had passed he quickened the pace of his horse, and shall further believe that in the exercise of reasonable care, by looking or listening, he could have seen or heard the car approaching before getting into a position of danger, and failed to so ascertain the approach of the car, and that he thereby contributed to the accident, they must find for the defendant."

Instruction "b," as offered, stated the general rule on the subject of contributory negligence, but failed to state the exception to it. In that respect it was amended by the court. As offered, it was in conflict with instruction No. 7, which, as we have seen, was properly given. There was no error either in refusing to give instruction "b" as offered or in giving it as modified by the court.

Instruction "c," as asked for by the defendant, was in the following words:

"The court further instructs the jury that if they believe from the evidence that this accident was caused by the concurrent negligence of the motorman and of John W. Gordon, due to each failing to keep a proper lookout, they must find for the defendant."

If the proximate cause of the injury was the negligence of both plaintiff and defendant concurring and co-operating together, then the general rule as to contributory negligence, and not the exception to the rule, applied, and the plaintiff was not entitled to recover. Beach Cont. Neg., § 56.

The defendant, therefore, had the right to have that theory or view of the case submitted to the jury. Where there is evidence tending to prove that the case comes within the general rule as to contributory negligence, and also evidence tending to prove that the case comes within the exception to that rule, each party has the right to have his theory or view of the case presented to the jury by proper instructions. If any authority were needed for this statement, it will be found in the case of *Richmond Traction Co. v. Martin's Admx.*, *supra*.

The court, therefore, erred in refusing to give instruction "c" as offered, which presented the defendant's theory of the case, and which, if sustained by the evidence, would have entitled it to a verdict.

In the modified form in which the court gave it it was clearly erroneous. If the proximate and efficient cause of the accident was the concurrent negligence of both parties, the plaintiff could not bring himself within the exception to the general rule, and he was not entitled to recover.

Instruction No. 1, as given by the court, is as follows:

"The jury are instructed that travelers may walk, ride, or drive either across or along a street railway track just as freely as upon any other part of the street, so long as they do not obstruct the cars, or carelessly expose themselves to danger. And while, generally speaking, one who is about to cross a street railway should both look and listen for cars, this is not an inflexible rule, nor is it to be enforced with any such strictness as in cases of an ordinary steam railway. It is not negligence as a matter of law to omit to do so. The question is whether men of ordinary prudence, exercising ordinary care and prudence, would have thought it unnecessary to do so."

The last sentence of this instruction is criticised as not correctly stating the rule by which the jury might determine whether or not the plaintiff exercised ordinary care in approaching the street car crossing. The language used varies somewhat from the usual statement of the rule as to what constitutes ordinary care. It is difficult, if not impossible, to frame a definition of "ordinary care" which will be perfectly clear and accurate. But the definition given in the instruction does not differ in substance from that usually given in such cases, and the jury could not have been misled by it.

Objection is also made to instruction No. 6, which is as follows:

"The jury are instructed that the burden is on the plaintiff to prove the negligence of the defendant company as charged in the declaration; and that, if the defendant relies on the contributory negligence of the plaintiff as a defense, the burden is on the defendant to prove such contributory negligence, unless it is disclosed by the plaintiff's evidence, or may be fairly inferred from all the circumstances of the case; and in the absence of such proof and inferences from the circumstances the plaintiff is presumed to have been without fault."

It is conceded that this instruction (No. 6) correctly states the law as an abstract proposition, but it is insisted that the court erred in giving it because it had no application to the facts of this case.

The case before the jury was one involving the questions of negligence and contributory negligence. An instruction which correctly stated to the jury upon whom the burden of proof was in such a case cannot be regarded as erroneous, or as tending to mislead the jury.

It is unnecessary to consider the remaining assignment of error that the verdict is against the evidence, as the judgment will have to be reversed, the verdict set aside, and a new trial awarded for the error committed by the court in refusing to give instruction "c," as offered, and in giving it as amended by the court.

Lawson v. Seattle & Renton Railway Co.

(Washington — Supreme Court.)

INJURY TO PASSENGER RIDING ON RUNNING-BOARD; INTOXICATION NOT NEGLIGENCE PER SE.—The plaintiff was riding as a passenger upon the running-board of one of the defendant's street cars, not being able to stand inside the car because of its crowded condition, and while the car was rounding a curve he was thrown therefrom and injured. There was testimony to the effect that the plaintiff was intoxicated at the time of the accident, and it was contended by the plaintiff that this constituted contributory negligence. An instruction to the effect that intoxication on the part of the plaintiff is not, as a matter of law, such negligence or such evidence of negligence as will bar recovery; that if the plaintiff used that degree of care incumbent upon him to use under the circumstances of the case, his intoxication would not prevent his recovering; that it must appear from the evidence that the plaintiff did not exercise

AGED, INFIRM, AND HELPLESS PASSENGERS.

1. Duty of street railway company toward helpless passengers.

a. Toward different classes.

I. In general.

II. Children.

III. Intoxicated persons.

b. Toward passengers.

I. In general.

II. Aged persons.

III. Children.

IV. Cripples.

ordinary care, without reference to his intoxication; that if the plaintiff was intoxicated and in a place of danger, and if from the evidence it appeared that the motorman knew these facts, the motorman was bound to run the car more carefully in order to prevent throwing the plaintiff from the car, was held not erroneous as eliminating from the consideration of the jury the question of the plaintiff's intoxication, or as instructing them that if they believed he was intoxicated when the accident occurred then he was under obligation to use only that degree of care which would have been required of men intoxicated as he was.

- c. To passengers.
 - I. Children.
 - II. Intoxicated persons.
 - III. Sick persons.
- d. To passengers.
 - I. In general.
 - II. Aged persons.
 - III. Blind persons.
 - IV. Children.
 - V. Corpulent persons.
 - VI. Pregnant women.
- e. Toward persons assisting the helpless.
- f. Necessity of notice of infirmity.
 - I. In general.
 - II. Crippled persons.
- g. Duty on ejecting helpless persons.
 - I. Intoxicated persons.
 - II. Sick persons.
- 2. Right to refuse passage.
 - a. In general.
 - b. Aged persons.
 - c. Blind persons.
 - d. Insane persons.
 - e. Intoxicated persons.
 - f. Sick persons.
- 3. Contributory negligence of persons not in good physical condition.
 - a. Cripples.
 - b. Pregnant women.

1. Duty of street railway company toward helpless passengers. a. Toward different classes. I. In general.—It is submitted that the same rules in this subject generally apply to street railways as they do to steam railways. Hence frequent citations will be made from the latter class of cases in support of propositions concerning the former. Street railway operators owe the duty to helpless passengers to give them more attention than those physically able to care for themselves. Thus in *St. Louis, A. & T. R. Co. v. Finley* (Mo. App.), 15 S. W. 256, the court said: "We do not understand

APPEAL by defendant from judgment for plaintiff. Decided April 4, 1904.
Reported (Wash.) 76 Pac. 71.

Peters & Powell, for appellant.

Turner & Weter, for respondents.

Opinion by HADLEY, J.

Respondents, constituting a community, sued appellant to recover for personal injuries to respondent Bernard Lawson. The complaint alleges that said respondent took passage upon one of

it to be a rule of law that a carrier owes to every passenger precisely the same care, without respect to age, sex, or bodily infirmity. The degree of care is the same, that is to say, the greatest care; but what would be sufficient to insure the safety of one person may not be sufficient for others, physically less able to take care of themselves. It is a matter to be determined by the jury." And in *Hanks v. Chicago & Alton R. Co.*, 60 Mo. App. 274 (281), it is said: "A person who is blind, aged, sick, or infirm, if his condition is known to the carrier, is entitled to more care and attention than one who is under no such disability, as to the time allowed and assistance rendered in getting on or off the carrier's conveyance."

II. Children.—The general rule is that children will be expected to use discretion only in proportion to their years and experience. Hence contributory negligence on their part in entering and leaving cars will to a great extent be overlooked. In *Little Rock Tract. Co. v. Nelson*, 66 Ark. 494, 52 S. W. 7, it was held that in entering, riding upon, and leaving street cars, a boy ten years of age or over, is bound to exercise prudence equal to his age, knowledge, and experience; to that extent he is under a legal duty to avoid danger, and is held responsible in law for acts or omissions contributing to his own injury. In 1 *Thomp. Neg.* 452, it is said: "The general rule is that where the injury is caused by the actual negligence of the company, the child can be expected to use discretion only in respect to its years; and the total incapacity of the child to know the danger and avoid it, shields it from responsibility for its acts." See also *Wyatt v. Citizens' Ry. Co.*, 55 Mo. 485; *Muelhausen v. St. Louis Ry. Co.*, 91 Mo. 332; *Beck v. People's St. Ry. Co.*, 46 Mo. App. 555.

III. Intoxicated persons.—Thompson on Passengers, at page 27, says: "The fact that a passenger is intoxicated does not absolve the carrier from the duty of exercising the same care for his safety as for that of other passengers, although this circumstance may be shown as indicating contributory negligence in case of injury received by him. Indeed, it is properly held that it is the duty of the carrier's servants, under such circumstances, where aware of the intoxication of the passenger, to give him that degree of attention which considerations for his safety demand, beyond that ordinarily bestowed

the electric railway cars owned and operated by appellant; that he went aboard the car at the corner of Second avenue and Washington street, in the city of Seattle, for the purpose of riding to his home, in Central Seattle; that the car was crowded with passengers, so that he could neither obtain a seat nor stand inside the

upon passengers." See also *Illinois Ry. Co. v. Sheehan*, 29 Ill. App. 90; *McClelland v. Louisville, etc., Ry. Co.*, 94 Ind. 276; *Weltz v. Indiana Ry. Co.*, 105 Ind. 55; *Weeks v. New Orleans Ry. Co.*, 32 La. Ann. 615; *Werner v. City Ry. Co.*, 81 Mo. 368.

See further, as to classes of passengers, under the following subdivisions:

b. Toward passengers entering cars. I. In general.—In *Yarnell v. Kansas City, etc., Ry. Co.*, 113 Mo. 570, 21 S. W. 1, the court quotes from 2 *Shearm. & Redf. Neg.*, § 508, as follows: "As soon as a passenger has fairly entered the vehicle, the carrier may start without waiting for him to reach a seat, unless there is some special reason for doing so, as in the case of a weak or lame person, or of a passenger on the outside of a coach. And the ground of exception must be brought to the carrier's notice, or he will be justified in starting in the usual manner."

II. Aged persons.—In *Schiller v. Dry Dock, etc., Ry. Co.*, 26 Misc. Rep. (N. Y.) 392, 56 N. Y. Supp. 184, it was held to be erroneous to dismiss a complaint on the ground that plaintiff has not been shown negligent where the proof is that after the plaintiff, who was infirm and used a cane, had caused a street car to be stopped, and while he had one foot on the step of the car and one foot on the ground, the conductor rang the bell and the car started again, and that thereupon the plaintiff fell down and was injured. In *Morrison v. Broadway & S. A. Ry. Co.*, 130 N. Y. 166, 29 N. E. 105, it was held that the contributory negligence of a man of seventy in getting on a car was a question for the jury. See also *Croom v. Chicago, etc., Ry. Co.*, 52 Minn. 296, 53 N. W. 1128.

III. Children.—In *Drew v. Sixth Ave. Ry. Co.*, 3 Keyes (N. Y.) 429, where a boy eight years old was pulled on a car by the brakeman while it was in motion, and fell under the cars and was injured, it was held that the company was responsible for the negligence of its agents in giving the assistance and that a verdict of \$2,500 was not excessive.

IV. Cripples.—In *Central Texas & N. Ry. Co. v. Holloway*, 54 S. W. 419, it was held that the persons in charge of a train were negligent, where, with knowledge that a passenger boarding it is a cripple and compelled to use a crutch and stick, they start before she has reasonable time to enter the car and take her seat, thereby causing injury to her.

c. To passengers while en route. I. Children.—In *Sheridan v. Brooklyn City, etc., R. Co.*, 36 N. Y. 39, where deceased was a child, aged nine, and was compelled by the conductor to stand on the platform of a crowded car, and was crowded off and injured, it was held that defendant was negligent in placing deceased on the platform. The court said: "No one whether

car, and that he was compelled by reason of said crowded condition to ride, and did ride, upon the running-board or side step of the car, without any notice or knowledge that it would be dangerous to ride at that place; that, while so riding, and while exercising due care on his part, at a point where the line of road turns sick, lame, imbecile, or vigorous and youthful is bound to exercise all the skill and all the care that the most capable and ready-witted person could command. Ordinary capacity and ordinary care and attention in protecting themselves is all that the law requires. This each is bound to give, whatever his age or condition; and if he fails he cannot call upon others to supply his deficiencies, or to compensate him for losses arising from its absence." In *Pittsburg, etc., Ry. Co. v. Caldwell*, 74 Pa. St. 421, it was held negligence in a street car driver to allow a child of five years to ride on the front platform of a car; and in *East Saginaw Ry. Co. v. Bohn*, 27 Mich. 503, it was held that a child not of an age or discretion to understand the danger in riding upon the front platform of a street car, cannot be charged with negligence in so doing.

II. Intoxicated persons.—Where an intoxicated person, riding on the front platform of a car, was thrown off and injured, held that this was not conclusive evidence that the person injured was not in the exercise of due care. *Maguire v. Middlesex Ry. Co.*, 115 Mass. 239. In *St. Louis, etc., Ry. Co. v. Carr*, 47 Ill. App. 353, it was held that if the servants of a railway company knew that a passenger on one of its trains was in a state of unconsciousness through intoxication, and knew that while in that condition he was sitting on the rear steps of the last car of the train while it was in motion, and permitted him to remain there, whereby he fell off and was killed, the company was liable. However, it was held in *Strand v. Chicago, etc., Ry. Co.*, 67 Mich. 380, that there could be no recovery where defendant's agents were without knowledge of plaintiff's condition. See also *Missouri Pacific Ry. Co. v. Evans*, 71 Tex. 361; *Holmes v. Oregon & California Ry. Co.*, 5 Fed. 523; *Fisher v. West Virginia & Pittsburgh Ry. Co.*, 39 W. Va. 366, 19 S. E. 578.

III. Sick persons.—In *McCann v. Newark, etc., Ry. Co.*, 58 N. J. L. 642, 34 Atl. 1052, the court said: "It is but a corollary from the principle which enjoins upon these carriers reasonable care for the security of their passengers that when, through sudden illness, a passenger becomes less able to look after his own safety, and that fact is made known to the proper agent of the carrier, the latter must exercise toward the passenger a greater degree of care than is demanded in ordinary circumstances." **I. In general.**—Sufficient time in which to d. To passengers on leaving car. A cripple or feeble person should have more consideration on that account. *Colt v. Sixth Ave. Ry. Co.*, 33 N. Y. Super. Ct. 189. In *Railroad v. Mitchell*, 98

from Washington street into Rainier avenue he was thrown from the car and dragged for some distance; that he was so thrown and dragged wholly because of appellant's carelessness and negligence in permitting him to ride upon said running-board, and in running the car around the curve at a high rate of speed, making

Tenn. 27 (31), 40 S. W. 72, the court said: "As railroad companies usually carry, not merely the vigorous and active, but also those who from age or extreme youth are slower in their movements than vigorous and active persons, the time of stopping is not to be measured by the time in which the latter may make their exit from the train, but by the time the other class may, using diligence, but without hurry or confusion, alight. Those in charge of the train are bound to presume that there may be such persons in the cars and, unless they know there are not, they have no right to start the train until they have waited long enough to allow such passengers to alight, nor even, after waiting a reasonable time for such persons to get off, have they a right to start the train without using reasonable care to ascertain if there are such persons in the act of getting off." See also *Memphis St. Ry. Co. v. Shaw*, 1 St. Ry. Rep. 771.

II. Aged persons.—In *Anderson v. Citizens' St. Ry. Co.*, 12 Ind. App. 194, the court said: "It was the duty of the driver to take into consideration the age and physical condition of the passenger at the time she attempted to alight." In *Columbus, etc., Ry. v. Powell*, 40 Ind. 37, it was said: "When informed of the dimness of vision and enfeebled condition of the deceased, the conductor undertook to put him off, he should have made use of such care as the condition of the deceased required to prevent injury to him." A contrary rule is set forth in *New Orleans, etc., R. v. Statham*, 42 Miss. 614, which is often quoted in the opinions. There the court said: "Railroad cars are not traveling hospitals, nor their employees nurses. Sick persons have the right to enter the cars of a railroad company; as common carriers of passengers they cannot prevent their entering their cars. If they are incapable of taking care of themselves they should have attendants along to care for them, or to render them such assistance as they may require in the cars; and to assist them from the cars at the point of their destination. It is not the duty of conductors to see to the debarkation of passengers. They should have the stations announced; they should stop the train sufficiently long for the passengers for each station to get off. When this is done their duty to their passengers is performed. All assistance that a conductor may extend to ladies without escorts, or with children, or to persons who are sick and ask his assistance is purely a matter of courtesy and not at all incumbent upon him in the line of his public duty." The facts in this case, however, do not seem to warrant the statement in the opinion. The passenger was an aged sick man. He was carried beyond his station. The train stopped and backed up with him. He was not injured. The court denied exemplary damages. It seems doubtful if the court would go so far in case of an actual injury and actual damages given therefor.

it sway, spring, and jolt, thereby causing said respondent to slip and lose his footing, and to be thrown and dragged as aforesaid. The answer denies the material allegations of the complaint, and pleads contributory negligence. A trial was had before the court and a jury, and a verdict was returned in favor of respondents

III. Blind persons.—In *Gonzales v. N. Y. & Harlem Ry. Co.*, 50 How. Pr. (N. Y.) 126, deceased, a man with impaired vision, but good hearing, stepped from the wrong side of a train and was hit by another. The court held that it was contributory negligence, as he could have heard the other train if he had listened.

IV. Children.—In *Ridenhour v. Kansas City Cable Co.*, 102 Mo. 270, 13 S. W. 89, where the plaintiff, aged nine, started to get off, and when on the platform the car was started and he was thrown to the ground and his arm was run over, the company was held negligent in not affording sufficient time to alight. The court said: "If a passenger is evidently crippled, infirm or very young, the duty of the carrier toward him while alighting must be performed with due regard to such apparent condition." Cited in *Sly v. Union Depot Ry. Co.*, 134 Mo. 681, 36 S. W. 235. See also *Philadelphia City Ry. Co. v. Hassard*, 75 Pa. St. 367, where the question of negligence is held to be for the jury.

V. Corpulent persons.—"If a passenger is known to be in any manner afflicted by a disability by which the hazards of travel are increased, a degree of attention should be bestowed to his safety beyond that of an ordinary passenger." *Wardle v. City Ry. Co.*, 35 La. Ann. 202. Here a woman sixty years old, weighing 260 pounds, started to get off a car. It started while she was on the step and she was permanently injured by being thrown therefrom. Held, that a verdict of \$5,000 would not be set aside. A contrary view is held in two cases: *Jacobs v. West End Street Ry. Co.*, 59 N. E. 639, holding that it is not a necessary duty of a conductor to stop all other business to help a 200-pound woman off from a car, and *Louisville & Nashville Ry. Co. v. Hale*, 19 Ky. L. Rep. 165, 44 S. W. 213. In the latter case the court said: "While recognizing that it (a railroad company) owes a higher degree of care to a lame or infirm person than to persons in ordinary health, we cannot concede that the mere fact of appellee being fleshy, and incumbered with a number of children (she having an escort with her) was any sufficient notice to the conductor of an infirmity which required extraordinary care on his part."

VI. Pregnant women.—A woman five months in pregnancy was a passenger. Her train slowed up at her station, but did not stop. The conductor told her to jump, which she did, resulting in injury. She was held not guilty of contributory negligence. The court held that the conductor should have the ordinary discernment to note the difference between a vigorous man and a woman in this condition. *Baltimore & Ohio Ry. Co. v. Leaply*, 65 Md. 571, 4 Atl. 891.

in the sum of \$630. Appellant moved for a new trial, which was denied, and judgment was entered for the amount of the verdict. The defendant has appealed.

It is first assigned that the court erred in not setting aside the verdict, because it is urged that it was against the weight of the

e. Toward persons assisting the helpless.—In *Lake Shore & Michigan Southern Ry. Co. v. Salzman*, 52 Ohio St. 558, 40 N. E. 891, the court said: "In travel by ship care and medical attendance are always provided by the company, as one of the necessities of the journey. In travel by rail no such necessity exists and therefore a railroad company is under no obligation to furnish hospitals on wheels, or physicians or nurses, to attend the sick on their journeys. But without hospitals and without physicians and nurses of their own still much can be done to alleviate the pains and aches of a sick passenger. While the train is in motion the passenger is utterly helpless as to aid, except from those on the train. His fellow passengers owe him no duty except humanity. The alternative is presented of being cared for by his fellow passengers, by the company, or to writhe in pain and sickness until relieved by death or the end of his journey. By taking passage and paying his fare the relation of carrier and passenger is established between the company and himself, and as he is under the control of the company for many purposes, and debarred by the rapid movement of its trains from receiving aid from the outside world, it would seem to follow as a necessity of the situation that those who have received his money and are thus rapidly transporting him, should assume the obligation of taking reasonable care of him, in case of sickness while on the train. In case of smallpox, or cholera, or other contagious disease, the comfort and safety of the other passengers would demand the early removal of the afflicted passenger from the train. The company would in such case be charged with the duty of removal, and reasonable care thereafter, until the afflicted person could be otherwise cared for. It is, therefore, clear that the company owed a duty to the sick passenger and was under obligation to take reasonable care of him — such care as was fairly practicable with the facilities at hand, without unreasonable delay of the train, or the discomfort of the other passengers. The defendant in error assisting in the care of such sick person by direction or permission of those in charge of the train was entitled to at least ordinary care on their part for his protection from injury." Defendant in error was injured while assisting a sick passenger between two cars. Held, a verdict of \$9,100 would not be set aside. So one assisting a feeble person onto a train is entitled to a sufficient time to leave the train. *Louisville & Nashville R. Co. v. Crunk*, 119 Ind. 542, 21 N. E. 31. But if he attempts to leave the train after it is under motion he will be held guilty of contributory negligence. *Lucas v. New Bedford & Taunton Ry. Co.*, 6 Gray (Mass.), 64.

f. Necessity of notice of infirmity. 1. In general.—The carrier must have notice of a passenger's disability or negligence will not attach to him. Thus

evidence. It is true, there was decided conflict in the to material matters, but it was the province of the jury to determine as to its credibility. It is a general rule that the verdict will not stand aside on appeal where there is substantial conflict in the

Thompson on Passengers, at p. 270, says: "It is consistent common humanity but with the legal obligations of the carrier, senger is known to be in any manner affected by a disability, mentally, whereby the hazards of travel are increased, a degree should be bestowed to his safety, beyond that of an ordinary proportion to the liability to injury from the want of it. But the carrier may be invested with this duty it is necessary that he should know of the disability of the passenger in this respect should be made known to his servants." See also *Willitts v. Erie R. Co.*, 14 Barb. 570; *Yarnell v. Kansas City, etc., Ry. Co.*, 113 Mo. 570, 21 S. W. 2d 113; *latter case quotes from Shearm. & Redf. Neg.*, § 508, as soon as the passenger has fairly entered the vehicle, the carrier is liable for his injury, without waiting for him to reach a seat, unless there is some reason for doing so, as in the case of a weak or lame person, senger on the outside of a coach. And the ground of the exception is that the carrier's notice, or he will be justified in starting in that manner."

II. Crippled persons.—Unless the representatives of the company have reason to believe the existence of the disability, the carrier is under no greater care than if such disability did not exist. See *Jackson v. Chappell*, 21 Fla. 175, where a cripple was injured by the starting of the car before he was seated, and the company was held liable, its agents having no notice of plaintiff's infirmity. See *Texas & N. Ry. Co. v. Holloway* (Tex. App.), 54 S. W. 419; *Chicago, etc., Ry. Co.*, 67 Mich. 380, 34 N. W. 712; *Wardle v. Chicago, etc., Ry. Co.*, 35 La. Ann. 202; *Louisville & Nashville R. Co. v. Hale*, 19 Ky. 44 S. W. 213; *Weightman v. Louisville Ry. Co.*, 12 So. 586, a *H. & St. L. R. Co. v. Bowlds*, 64 S. W. 957, where a conversation had with the conductor on entering the car was held competent evidence that defendant's servants knew of plaintiff's crippled condition. See *Schultz v. Ry. Co. v. McClurg*, 56 Pa. St. 294 (296), and *Louisville & Nashville R. Co.*, 66 N. H. 256.

g. Duty on ejecting helpless persons. **I. Intoxicated persons.** The carrier is not to be taken to eject such persons in a safe place and under safe circumstances. See *Elliott on Railroads*, at § 1637, says: "If he (a passenger) is so old or so young or feeble, as not to be able to take care of himself for his own safety, the company should exercise reasonable care to see that he is not expelled or abandoned in such a place and under such circumstances, that he will be exposed to unnecessary peril." See

and especially where the trial judge, who heard and saw the witnesses testify, has declined to interfere. *Bucklin v. Miller*, 13 Wash. 152, 40 Pac. 732; *Miller v. Bean*, 13 Wash. 516, 43 Pac. 636; *Reiner v. Crawford*, 23 Wash. 669, 63 Pac. 516, 83 Am. St. Rep. 848.

It is next assigned that the court erred in giving the following instruction:

"You are instructed that intoxication on the part of the plaintiff, if you believe that the plaintiff Mr. Lawson was intoxicated, is not, as a general rule, in itself, as a matter of law, such negligence, or such evidence of negligence, as will bar his recovery in this action. The law refuses to impute negligence, as of course, to a plaintiff from the bare fact that at the moment

v. Union Ry. Co., 118 Mass. 228, where a passenger on a horse railway was so intoxicated as to be offensive to the other passengers, it was held that the conductor had a right to remove him; and that it was a question for the jury, whether it was due care for the conductor to attempt to remove him while the car was in motion. See also *Roseman v. Railroad Co.*, 16 S. E. 768; *Railroad Co. v. Wright*, 68 Ind. 586; *Brown v. Railroad Co.*, 51 Iowa, 235, 1 N. W. 487; *Haug v. Great Northern R. Co.*, 8 N. D. 23, 77 N. W. 97; *Tanner v. Railroad Co.*, 60 Ala. 621; *Isbell v. Railroad Co.*, 27 Conn. 393; *Kerwhacker v. Railroad Co.*, 3 Ohio St. 172; *Railroad Co. v. Sullivan*, 81 Ky. 624; *Kline v. Railroad Co.*, 37 Cal. 400; 3 Wood's Railway Law, §§ 363, 364; *Shearm. & Redf. Neg.*, § 493; 2 Am. & Eng. Encyc. of Law, 748.

II. Sick persons.—In *Connolly v. Railroad Co.*, 41 La. Ann. 57, the court said: "When the condition of a sick passenger is such that his continued carriage is inconsistent with the safety, or even the reasonable comfort of his fellow passengers, regard for the rights of the latter will authorize the carrier to exclude him from the conveyance. Thus if he had cholera, or smallpox, or delirium tremens, or even if as in this case he were subject from any cause, to continuous vomiting, utterly inconsistent with the comfort of other passengers in a street car, the right of the carrier, in protection of the latter's privileges, to exclude him, would undoubtedly arise. (Citing cases.) But none of these cases hold that this right of exclusion can be exercised arbitrarily and inhumanly, or without due care and provision for the safety and well-being of the ejected passenger. On the contrary, the duty of exercising such care and provision is universally recognized." And in *Regner v. Glens Falls, etc., Ry. Co.*, 74 Hun (N. Y.), 202, 26 N. Y. Supp. 625, it was held that a rule of a street railroad company, requiring conductors not to allow intoxicated persons to ride on the cars, is no protection to the company for the forcible ejection of a person not disorderly or intoxicated, but affected with a disease—St. Vitus dance—which produces involuntary motions resembling the movements of an intoxicated person. See also *Paddock v. Atchison, T. & S. F. Ry. Co.*, 37 Fed.

of receiving the injury he was intoxicated. Intoxicated persons moved from all protection of the law. If the plaintiff used that care incumbent upon him to use, under the circumstances of this his intoxication, if you believe that he was intoxicated, had not with the accident. I wish to substitute in place of the words 'had do with the accident,' 'would not prevent his recovering.' When negligence is one of the issues, as in this case, the defendant must you, or it must appear to you from all the evidence, that the plain exercise ordinary care; and that, too, without reference to his in The question is not whether or not the plaintiff was drunk, but not he exercised ordinary care. You are instructed that if you find plaintiff was intoxicated and in a place of danger, and that if you the motorman knew these facts, the motorman was bound to run the carefully, in order to prevent throwing Mr. Lawson off the car, if he was in a place of danger."

841; *Lemont v. Washington & Georgetown Ry. Co.*, 1 Macke, Am. Rep. 238; *Weightman v. Louisville Ry. Co.*, 12 So. 586; *A. & S. F. Ry. Co. v. Weber*, 33 Kan. 543; *Sevier v. Vicksburg & I.* 61 Miss. 8.

2. Right to refuse passage. a. In general.—A carrier may refuse persons unable to exercise ordinary precautions against injury, does accept them as passengers it owes them the greatest care. *v. Citizens' St. Ry. Co.*, 16 Ind. App. 171, where the court said: "The carrier accepts a passenger knowing that he is sick or infirm it must exercise ordinary care to see that he is transported safely and is given a reasonable and proper assistance in getting on and off its cars. * * * If a person, desiring to become a passenger, is unable on account of extreme youth or age, or any mental or physical infirmities, to take care of himself, he must be provided with an attendant to take care of him. The carrier is bound to furnish him an attendant."

b. Aged persons.—In *Croom v. Railway Co.*, 52 Minn. 296, 53 N. W. 225, the court said: "A railroad company is not bound to turn its cars into nurseries or hospitals, or its employees into nurses. If a passenger of extreme youth or old age or any mental or physical infirmities desires to take care of himself, he ought to be provided with an attendant to take care of him. But if a company voluntarily accepts a person as a passenger, without an attendant, whose inability to take care of himself is made known, to its servants, and renders special care and assistance necessary, the company is negligent if such assistance is not afforded."

c. Blind persons.—In *Zackery v. Mobile & Ohio R. Co.*, the court held that, "as a proposition of law, stripped from all attendant circumstances, public carriers of passengers can reject a person, otherwise sane (as a passenger) upon the sole ground that he is blind."

d. Insane persons.—The carrier cannot expel an insane man, although once admitted him as a passenger and received his fare, his conduct

There was testimony to the effect that the injured respondent was intoxicated at the time of the accident, and this is urged as showing contributory negligence. Witnesses in rebuttal denied that he was intoxicated. Appellant, in criticising the above instruction, contends that it altogether eliminated from the consideration of the jury the question of the respondent's intoxication, or that it suggested that only that degree of care was required of him which one "under the circumstances of this case" would be expected to use; that is to say, that, if the jury believed that respondent was sober, in that event he was required to use the same degree of care which would have been required of sober men under the same surroundings, but that, if they believed he was intoxicated, then he was under obligation to use that degree of care only which would have been required of men intoxicated as he was. Appellant cites *Buesching v. St. Louis Gas Light Co.*, 6 Mo. App. 85, as a case in which, it claims, a similar instruction was given. At page 92 of the volume cited, the opinion, after

unobjectionable, though it might have declined to receive him in the first place. *Pearson v. Duane*, 4 Wall. 605.

e. **Intoxicated persons.**—The fact that a man is intoxicated does not of itself deprive him of the right to ride upon a railroad train, nor does it free the company from its duty to render to him, as a passenger, due care. *Milliman v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 642.

f. **Sick persons.**—A carrier is not bound to receive passengers infected with contagious diseases. *Thurston v. U. P. R. Co.*, 4 Dill. 321.

3. **Contributory negligence of persons not in good physical condition.**

a. **Cripples.**—A railroad company owes a duty to others besides persons of ordinary physical ability. They are presumed to know that persons in feeble health, old or decrepit, travel upon their trains and they must exercise care accordingly. *East Line, etc., Ry. Co. v. Rushing*, 69 Tex. 306. See also *Shenandoah Valley R. Co. v. Moose*, 83 Va. 827, where a passenger with rheumatism was injured by a collision, and it was held that he was not guilty of contributory negligence in undertaking his journey in that condition. See also *Jacksonville St. Ry. Co. v. Chappell*, 21 Fla. 175, where it was held that defendant's agents must have knowledge of plaintiff's infirmity.

b. **Pregnant women.**—Where a pregnant woman was injured by the derailment of a street car, the court said: "The law did not require her to expect extraordinary events, but only the effects of the ordinary running of the road; nor did it require her to be in such a bodily condition as to be able to withstand anything more than the effects of the usual and ordinary running of the cars." *Reading City Ry. Co. v. Eckhart*, 4 Atl. 530, 2 Cent. 791. See also *Sawyer v. Dulany*, 30 Tex. 479.

stating that, at the instance of the plaintiff, the trial of the jury that if the cellar entrance was dangerous to and deceased was, in consequence, injured while exercising care, they should find for the plaintiff, also follows:

“ * * * and further declared that ‘ordinary care’ means care which may reasonably be expected of a person in the situation at the time of the accident. This definition of ‘ordinary’ in some text-books. But, in view of the evidence in this case, it is not to be taken as intended to mislead. There was some testimony in this case from which it might be inferred that the deceased was not entirely sober at the time of the accident.”

As far as appears from that opinion, no other definition of “ordinary care” was given by the court, and it was possible that the definition given, in view of the testimony, was correct. In the case at bar, we think the court several times in its instructions made it clear to the jury that the ordinary care is that it must be such as an ordinarily prudent person would exercise under the same circumstances. It has been often held by this court that the instructions should be read and construed as a whole, and not in detached parts. We think the suggestion of respondents’ counsel as to the propriety of the instruction is pertinent, viz., that, after having told the jury that ordinary care was required of respondents, and that such care was required of respondents on the premises, the instruction had the effect to caution against the danger of supposing, in view of the testimony of intoxication, that their only duty was simply to determine whether respondent was intoxicated or not. Such an impression may have been erroneous, since the real test which they should have kept before their minds was, did respondents exercise the care of a reasonable and ordinarily prudent person would have exercised under similar surroundings and circumstances? The effect of the instruction was not to tell the jury that they could not find for respondents in case of intoxication, if they found there was such, as an element tending to minimize the existence or absence of ordinary care, but that the latter question was the real one to determine, and not the matter of intoxication. The whole instruction criticizing immaterial exceptions, was given in the same words by

trial court. The Supreme Court of that State, in passing upon the instruction, said:

"Counsel says, 'This instruction commences by advising the jury that intoxication in itself, as a matter of law, is not such negligence as will bar his recovery in this action,' and ends by advising the jury that 'it must appear that the plaintiff did not exercise ordinary care, and that, too, without reference to his inebriety. The question is whether or not the plaintiff's conduct came up to the standard of ordinary care, not whether or not the plaintiff was drunk.' It requires considerable ingenuity to find fault with the language cited. It, in effect, properly states the law to be that the questions being tried were the negligence of the defendant and the contributory negligence of the plaintiff, not whether the plaintiff was at the time intoxicated. That drunkenness on the part of plaintiff would not relieve the defendant from liability, if guilty of negligence, and that, drunk or sober, if the plaintiff, by want of ordinary care, contributed to the injury, he must assume such responsibility, regardless of his condition. We cannot well see how it could have been different. If drunk, he was held responsible for his negligence; and, if drunk, it can hardly be contended that it gave the defendant, for that reason, the right to kill or maim him, but, if known, imposed greater care on the defendant." *Denver Tramway Co. v. Reid*, 35 Pac. 269, 275.

It is next assigned that the court erred in not striking from the complaint, and in not withdrawing from the consideration of the jury, respondent Anna M. Lawson's claim of \$300 for services as nurse, for the reason that the averments of the complaint were not sufficient, and that there was no evidence to justify any recovery for such services. The jury returned a special finding of \$50 in favor of respondents as to that item, which amount was included in the aggregate sum of the general verdict. Mrs. Lawson, on cross-examination, testified that her husband was confined to his bed something more than one week, and that he was confined to the house for about one month, but that he was able to walk about the house after leaving his bed. She also testified that she waited upon him and attended him as nurse during this time, but that she at the same time attended to her household duties, and performed the services which she ordinarily discharged as a member of the community. There was no evidence that any expense was incurred or paid out to procure other help to assist the wife by reason of her engagement in waiting upon her husband. There was, therefore, no financial loss to the community on account of said services, unless it was entitled to recover the value of these

necessarily increased duties of the wife. There was, however, no evidence as to their value; and, even if it were a recoverable item, the jury should not have been left to speculate as to its value. In this particular we think the court erred.

The cause is, therefore, remanded, with instructions to the trial court to modify the judgment by reducing it in the sum of \$50. But in all other particulars the judgment is affirmed. The appellant is entitled to recover costs on appeal.

FULLERTON, C. J., and ANDERS, DUNBAR and MOUNT, JJ.,
CONCUR.

Daly v. Milwaukee Electric Railway & Light Co.

(Wisconsin — Supreme Court.)

RUNNING FREIGHT CARS ON STREET RAILWAYS WITHOUT AUTHORITY; LIABILITY FOR INJURIES.—Where the franchise of a street railway company only authorizes it to exercise such franchise for the purpose of carrying passengers, the running of freight cars over its tracks without authority and in violation of law is a public nuisance. So where a person is injured by such a use of the tracks without negligence on his part he may recover from the company the amount of his damages without regard to the degree of care exercised by the company in running such cars. A failure to allege negligence in the complaint in an action brought to recover such damages is not fatal.

APPEAL by defendant from an order overruling a demurrer to the plaintiff's complaint. Decided October 20, 1903. Reported (Wis.) 96 N. W. 832.

Statement of facts by CASSODAY, C. J.

This is an appeal from an order overruling a demurrer to a complaint which alleges, in effect, that the plaintiff is an infant eight years of age; that his father was duly appointed his guardian herein; that the defendant was duly incorporated under the statutes of this State, and at all the times mentioned authorized to operate street railways therein, and particularly in the city of Milwaukee; that the defendant derived its authority from certain ordinances of the city; that among others the defendant had a double-track street railway on Wells street from Eleventh street west to the city limits, upon which to run its cars, under the provisions of the ordinance, which, among other things, provided that "the said tracks and railway shall be used for no other purpose than the transport of passengers and their ordinary baggage, and the

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that the defendant was only authorized to use its tracks and railway for transporting passengers. Had the injury resulted from the use of such passenger cars, there might have been some force in the objection. *Chicago & Eastern Illinois R. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341; *Randle v. Pacific R. Co.*, 65 Mo. 325. But the *gravamen* of the complaint is that the plaintiff was injured by reason of the defendant running freight cars upon its tracks without authority and in violation of law. The question whether an indictment would lie at common law against a corporation for a misfeasance was answered in the affirmative by the Queen's Bench many years ago. *The Queen v. Great North of England Ry. Co.*, 9 Q. B. 315, 325. In that case it was said by Lord Denman, C. J., that "a corporation * * * may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large." *Id.* 326. Thus, it has been held in Massachusetts that "a railroad laid out over and along a highway in such a manner as to obstruct it, without express statute authority or necessary implication, is liable to indictment as a nuisance." *Commonwealth v. Old Colony & Fall River R. Co.*, 14 Gray, 93. See also *State v. Troy & Boston R. Co.*, 57 Vt. 144; *Evans v. The C., St. P., M. & O. R. Co.*, 86 Wis. 597, 603, 57 N. W. 354, 39 Am. St. Rep. 908. So it is well settled that if an individual, without fault on his part, suffers special damage by any unlawful act in obstructing a highway, he has a right of action therefor, although the party doing the act is also liable to an indictment for the same. *Thayer v. Boston*, 19 Pick. 514, 31 Am. Dec. 159; *Zettel v. The City of West Bend*, 79 Wis. 316, 319, 48 N. W. 379, 24 Am. St. Rep. 715, and cases there cited. Thus it has been held in New York that "the construction and maintenance of a street railway by any individual or association of individuals without legislative authority is a public nuisance, and subjects those maintaining it to a private action in favor of any person sustaining special injury therefrom." *Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 307. To the same effect, *Beekman v. Third Avenue R. Co.*, 153 N. Y. 144, 152, 47 N. E. 277; *Borough of Stamford v. Stamford Horse Ry. Co.*, 56 Conn. 381, 15 Atl. 749, 1 L. R. A. 375; *Wellcome v. Inhabitants of Leeds*, 51 Me. 313, 315. To the extent that the defendant exceeded its authority by running freight cars over its

tracks without legislative permission, express or implied, it must be regarded as acting in violation of law, and hence answerable accordingly. This has, in effect, been repeatedly held by this court. *Evans v. The C., St. P., M. & O. R. Co.*, 86 Wis. 597, 603, 57 N. W. 354, 39 Am. St. Rep. 908; *Linden Land Co. v. Mil. El. Ry. & L. Co.*, 107 Wis. 493, 513, 83 N. W. 851; *Allen v. Clausen*, 114 Wis. 244, 90 N. W. 181. Thus it is stated by a standard text-writer "that for personal injuries sustained by a person by reason of any nuisance in a highway, or injuries thereby inflicted upon his team or property, the person creating the nuisance, as well as the person maintaining it, is always liable in a civil action, if the person injured was in the exercise of ordinary care when the injury was inflicted; and no degree of care on the part of the person erecting or maintaining the nuisance will exempt him from liability." 2 Wood Nuisances (3d ed.), § 703. The theory is that, the act being wrongful, the party doing it is answerable for all the consequences that flow therefrom to a person who is not chargeable with negligence by reason of which the injury is inflicted. *Id.* The allegations of the complaint, if true, are sufficient to authorize a jury to find that the plaintiff's injuries were without fault on his part, and were actually caused by the running of the freight cars on the defendant's tracks in violation of law; and hence the complaint states a cause of action. The order of the Circuit Court is affirmed.

Smith v. Milwaukee Electric Railway & Light Company.

(Wisconsin — Supreme Court.)

INJURY TO PASSENGER CAUSED BY DERAILMENT OF CAR;¹ EXCESSIVE SPEED UPON A CURVE.—The plaintiff was a passenger upon one of the defendant's cars and was injured by the derailment of such car while rounding a curve at a speed of eighteen or twenty miles an hour. It appeared that at the place where the derailment occurred a large amount of crushed stone had been deposited by the defendant between, along, and upon its

Passengers injured by derailment of car.—See also the following cases reported in this series: *Doolin v. Omnibus Cable Co.*, 2 St. Ry. Rep. 18, (Cal.) 73 Pac. 1060; *Heyde v. St. Louis Transit Co.*, 2 St. Ry. Rep. 630, (Mo. App.)

track. It was held that the evidence was sufficient to raise an inference that the derailment of the car was caused by its operation, and that under the circumstances the case should be submitted to the jury.

APPEAL by defendant from an order setting aside a judgment and granting the plaintiff a new trial on the court's own motion, decided October 20, 1903. Reported 119 Wis. 336, 96 N. W. 82

Statement of facts by MARSHALL, J.

Action to recover for injuries received by plaintiff by the derailment of defendant's cars while she was a passenger thereon. The negligence complained of was running the car at a speed of eighteen to twenty hour contrary to the ordinance of the city regulating the movement where the track was in a defective condition in that foreign iron had been allowed by defendant to accumulate thereon and on the right of way. It was alleged that "The careless and negligent manner in which the car was run, namely, at its high and unlawful rate of speed, and that the said company to maintain its equipment in a safe and prudent manner were the proximate causes of said plaintiff's injury."

The defendant answered admitting that its car was derailed as alleged in the complaint, and that plaintiff was a passenger thereon, and alleged that the derailment was caused by the malicious and wanton

77 S. W. 127; *Baruth v. Poughkeepsie City & W. F. E. R. Co.*, 2 N. Y. 797, 89 App. Div. (N. Y.) 324, 85 N. Y. Supp. 822; *South Covington St. Ry. Co. v. Constans*, 1 St. Ry. Rep. 242, 25 Ky. L. Rep. 157, 705; *Leslie v. Jackson & Sub. Tract. Co.*, 1 St. Ry. Rep. 409, 10 N. W. 580.

As in the case of steam railroad companies a street railway is bound to the most exact care and diligence to protect its passengers from injuries occasioned by the structure and care of its tracks. *McElroy & L. R. Co.*, 4 Cush. (Mass.) 400, 50 Am. Dec. 794; *Virginia v. Sanger*, 15 Gratt. (Va.) 230. It cannot be relieved from liability to the condition and construction of its tracks by undertaking the duty of repairing such tracks to third parties. *Carrico v. Virginia, etc., Ry. Co.*, 35 W. Va. 389, 14 S. E. 12. Nor can it be relieved from responsibility for defectively located tracks, by saying that such was by authority of the municipality. *Baltimore & Y. Turnpike Co. v. Leonhardt*, 66 Md. 70, 5 Atl. 346.

Notwithstanding the duty imposed upon railroad companies to exercise the highest degree of practical care and skill in maintaining their tracks, they are not insurers of the safety of such tracks. *Louisville, etc., Ry. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 57 Am. Rep. 120. So that if a passenger is injured by a defect in a rail which could not have been discovered by the exercise of all the care reasonably consistent with the

tion of its track by persons not in its employ or in any manner connected with the defendant, and for whose conduct it was in no sense answerable.

There was evidence proving or tending to prove that plaintiff was injured by the derailment of the car; that at the time thereof the car was going at a speed of from twelve to twenty miles an hour and faster than the ordinance of the city permitted; that a large amount of crushed stone had been deposited by defendant between, along, and upon its tracks, and that there was a curve in the track where the car left the same. There was no other proof of how the accident was produced.

At the close of plaintiff's case a motion for nonsuit was granted. Subsequently plaintiff moved the court to vacate the nonsuit and for a new trial, which, after due deliberation, was denied. Judgment was rendered accordingly. Thereafter, before the close of the term, without notice to the parties or their attorneys, the judgment and the previous orders were vacated and a new trial granted. Defendant appealed.

Kearney, Thompson & Myers (Spooner & Rosecrantz, of counsel), for appellant.

John W. Owen (Wallace Ingalls, of counsel), for respondent.

Opinion by MARSHALL, J.

The first proposition of appellant's counsel is stated by them thus: "The nonsuit was not erroneous, the plaintiff having alleged specific negligence as the cause of the accident, was bound

sibility imposed upon the company, the company is not liable for injuries to a passenger resulting therefrom. *Chicago, etc., Ry. Co. v. Lewis*, 145 Ill. 67, 33 N. E. 960.

The obligation of carriers of passengers to exercise the highest degree of care which human prudence and foresight can suggest only exists with respect to those results which are naturally to be apprehended from unsafe roadbeds, defective machinery, imperfect cars, and other conditions endangering the success of the undertaking. *Palmer v. D. & H. C. Co.*, 120 N. Y. 170, 24 N. E. 302; *Morris v. N. Y. C. & H. R. R. Co.*, 106 N. Y. 678, 13 N. E. 475. In every case, the degree of care to be exercised is dependent upon the circumstances, and if the accident is attributable to the existence of defects in the road by reason of which there was a possibility of loss of life or limb to the traveling public, the strict rule requiring the highest degree of care and human skill would be applicable. *Stierle v. Union Ry. Co.*, 156 N. Y. 70, 50 N. E. 419.

It is not enough to excuse a railway company from liability for injuries to a passenger, caused by the derailment of a train, that the track was apparently in good and safe condition, if there were defects rendering it unsafe which, by the exercise of care and skill, might have been discovered and

to show such negligence, and that the accident was caused by the negligence of the driver. This she failed to do." From the argument of this brief case we gather the idea that counsel supposed that to the jury in finding that the negligence complained of caused the derailment of the car they must have some direct evidence on the subject; that otherwise they would be left to conjecture. There is probably no principle better understood than that facts can be established by indirect as well as by direct

remedied. *Nellis Street Railroad Accident Law*, p. 61. But negligence can not be imputed to a street car company from the mere fact that it left the track. The derailment, if caused by a bad condition of the track, calling for more than ordinary care, and the same was not expected, however, present a question for the jury as to the negligence of the company. *Hastings v. Central Crosstown R. Co.*, 7 App. Div. (N. Y. Supp. 93. Where a passenger was injured in a derailment the car colliding with a paving stone which lay between the tracks covered with snow and slush, the presence of which might have been discovered and the accident avoided by the exercise of that high degree of care which the law imposes on common carriers for the safety of their passengers, the company was held liable for the injuries resulting. *Dusenbury v. Hudson County Ry. Co.*, 66 N. J. L. 44, 48 Atl. 520.

In the case of *White v. Milwaukee City Ry. Co.*, 61 Wis. 551, 524, it appeared that the street railway was double tracked and the cars were so placed in each track as to prevent cars going in the proper direction from being thrown from the track while going upon or leaving the bridge; a loaded wagon having broken down on the bridge upon the upper tracks, a car approaching thereon was necessarily lifted to the bridge and being then driven rapidly upon the bridge, was thrown from the bridge, injuring a passenger. It was held that the company was not negligent in not placing frogs so as to prevent a car thus going in the wrong direction upon the track from being thrown off. Compare *Farrell v. Houston Ry. Co.*, 4 N. Y. Supp. 597.

Other cases where the liability of street railway companies for injuries to passengers caused by defective tracks has been considered are: *St. Ry. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756; *West Chicago Ry. Co. v. Stephens*, 66 Ill. App. 303; *Citizens' St. Ry. Co. v. Twine*, 13 N. E. 55; *Daub v. Yonkers R. Co.*, 69 Hun (N. Y.), 1 Supp. 268.

In an action against a street railroad company for injuries caused by the derailment of a car in which the plaintiff was a passenger, it was held that the plaintiff's evidence that the car was thrown from the track while negotiating a curve, and that the driver at the time was looking at some persons who were quarreling in the street. The defendant introduced evidence that the track at the place of the accident was in good condition, and was

If the circumstances of the accident in this case, as the jury had a right from the evidence to believe them to be, were such as to raise a reasonable inference that the derailment of the car was caused by the way it was operated, combined with the faulty condition of the track alleged, then a fair jury question in regard to the matter was presented. Now, notwithstanding the argument of counsel and the evident uncertainty the trial judge labored

in such manner as to materially reduce the chances of derailment, but no explanation was attempted as to what took place. It was held that the evidence was sufficient to carry the case to the jury on the question of the defendant's negligence. *Pollock v. Brooklyn, etc., R. Co.*, 60 Hun (N. Y.), 584, 15 N. Y. Supp. 189.

Presumption of negligence.—The rule that proof of the occurrence of an accident causing injury to a passenger arising from any disarrangement or displacement of the track or car of a street railroad company, operated by electricity, steam, cable power, or otherwise, or from a defect in any of those things which the carrier is bound to supply, is in itself presumptive evidence of the negligence of the carrier, is generally held, except that in certain jurisdictions proof is also required on the part of the passenger that the accident occurred without fault on his part. *Nellis Street Railroad Accident Law*, p. 572, and cases cited. The derailment of a street railway car by which a passenger is injured raises the presumption that the casualty was due to the negligence of the carrier, and the burden is on the carrier to rebut that presumption. *Montgomery & E. Ry. Co. v. Mallette*, 92 Ala. 209, 9 So. 363; *Electric Car Co. v. Carson*, 98 Ga. 652, 27 S. E. 156; *Elgin City R. Co. v. Wilson*, 56 Ill. App. 364; *Louisville & P. R. Co. v. Smith*, 2 Duv. (Ky.) 556; *Spelman v. Lincoln Rapid Trans. Co.*, 36 Nebr. 890, 55 N. W. 270, 38 Am. St. Rep. 753, 20 L. R. A. 316; *Bergen County Traction Co. v. Demarest*, 62 N. J. L. 755, 42 Atl. 729; *Stevenson v. Second Ave. R. Co.*, 35 App. Div. (N. Y.) 474, 54 N. Y. Supp. 815; *Armstrong v. Metropolitan St. R. Co.*, 23 App. Div. (N. Y.) 137, 48 N. Y. Supp. 597; *Hastings v. Central Crosstown R. Co.*, 7 App. Div. (N. Y.) 312, 40 N. Y. Supp. 93; *Cincinnati St. Ry. Co. v. Kelsey*, 9 Ohio Cir. Ct. 170; *Reading City Pass. Ry. Co. v. Eckert* (Pa.), 4 Atl. 530.

The rule is thus stated by Judge McClain in his article on "Carriers," 6 Cyc. 629: "It is very generally said, however, that proof of the happening of an accident which appears to have been due to defective roadbed, track, machinery, or appliances, or fault in the operation of the conveyance, makes out a *prima facie* case in an action by a passenger to recover for injuries resulting therefrom, and throws on the carrier the burden of proof to show his freedom from negligence; that is, from any want of the exercise of the high degree of care, skill, and foresight, required of carriers of passengers in the prosecution of their business with respect to the defect or fault which caused the accident."

under on the subject, it seems that the evidence tends to prove the acts of negligence alleged, and that they derailment of the car. Such evidence was to the effect the accident occurred there was a curve in the track; was crushed rock upon the rails, and that the motorman the car at a speed of from twelve to twenty miles per hour less of those conditions. One, it seems, has but to apply understanding to such a situation — a jury must necessarily be allowed to do that — to see that the derailment of the car probably caused by its being run too fast in view of the condition of the track and the presence upon the rails of crushed rock. The motorman in charge of the car might well have expected this, and he given any thought to the matter, that the car might have derailed on the track as it did. It follows that the nonsuit was properly granted, and that if the court had power to vacate its motion, and grant a new trial, appellant has no good ground for complaint.

It is insisted that the rule that a court of record has no power to set aside its judgments and orders during the term in which they were made, is not a rule that is to be adhered to in all cases, and that a court may, with or without a motion therefor, set aside such order or judgment if justice seems to require it, and that this power may be extended to a judgment or order deliberately entered during the term, as well as to a prior decision made during the term. If there is any authority to the contrary upon the rule we are not familiar with it. Counsel have produced any authority that there is. This court, in many cases, has declared in the broadest language that a court of record has no inherent authority to set aside any judgment or order entered during the term by it through mistake, inadvertence, or want of proper deliberation at any time during the term, and need not wait until the end of the term, or until power put in motion by the request of an interested party to set it aside. *Brown v. Brown*, 53 Wis. 29, 9 N. W. 790; *Fish*, 27 Wis. 535. In the last case cited the court said: "There can be no doubt of the power of the court to set aside any judgment or order inadvertently ordered, at the same term at which the judgment or order was entered," and "that the court may exercise that power on its own motion." It would be a violent infraction of the rule if a judge erroneously enters an order through inadvertence, or want of proper deliberation, and follows it up by a second order affirming the first, thereby repeating the error.

want of proper consideration of the subject, he is then powerless to correct the mistake, however apparent the same may be. The full scope of the rule was indicated in *Brown v. Brown*, where it was said that in the interests of justice the judge should be allowed to vacate any order made by him through mistake, inadvertence, or want of deliberation, at any time during the term in which the error is committed. Obviously, it can make no difference with the application of that principle that the mistake to be corrected is the final one in a series of erroneous rulings. The order is affirmed.

Forrestal v. Milwaukee Electric Railway & Light Co.

(Wisconsin — Supreme Court.)

DEATH OF CHILD CAUSED BY COLLISION WITH CAR; DUTY OF MOTORMAN TO AVOID INJURY.¹— The plaintiff's child, a girl of about seven years of age, was struck by one of the defendant's cars at a street crossing and killed. The child observing a car approaching on one of the tracks of the defendant waited for it to pass, and then crossed upon the other track without observing a car approaching from the opposite direction, and was struck by such car. As soon as the motorman observed the child upon the track he reversed the current and set his brakes, but was so near her that he could not avoid striking her. Under such circumstances it was held that the court was not justified in holding as a matter of law that the motorman was not guilty of negligence.

It was the duty of the motorman as his car approached the crossing to observe children near the track in such an attitude as to suggest a probability of their placing themselves in the way of the car, and to use all reasonable care to avoid injuring them in the event of that probability changing to a certainty.

The jury might well infer from the circumstances of the case that the motorman was negligent in not recognizing the possibility of a pedestrian emerging from behind a car on the other track, shutting off his vision at a street crossing, and attempting to cross the track in front of his car, and in failing to make proper provision to avoid a collision with a pedestrian so attempting to cross.

1. As to duty of motorman to avoid injury to children on or near track, see cases cited in *Harrington v. Los Angeles Ry. Co.*, *ante*, p. 23; *Jett v. Central Elec. Ry. Co.*, *ante*, p. 513; *Kube v. St. Louis Transit Co.*, *ante*, p. 597.

Statement of facts by MARSHALL, J.

Action to recover damages alleged to have been caused to the child of Genevieve Forrestal, deceased, by the act of defendant in negligence her death. The claim set forth in the complaint is that the child, an infant of the age of six years and eleven months, while lawfully crossing of Sixteenth and State streets in the city of Milwaukee, a thoroughfare therein, engaged in crossing State street, was, by the negligence of the motorman in charge of one of defendant's cars operating on State street, struck by the car and fatally injured. The alleged negligence of the motorman is failure to give the deceased proper warning of the approach of his car, running it at an unlawful rate of speed, failure to exercise proper control, failure to see the child in time to avoid injury, and failure to properly use the fender device on the car when it was so close that the car could not be stopped before reaching the child. In the foregoing the complaint contained proper allegations as to facts and circumstances all conditions precedent to the maintenance of the action.

The answer put in issue the allegations of negligence, and the damages suffered by the heirs-at-law of the deceased.

The evidence produced upon the trial was to the following effect: The street in the city of Milwaukee is about sixty-four feet wide. It runs north and south and is crossed by Sixteenth street, which is about sixty feet wide. Upon State street, at the time of the accident, defendant operated a street car system, using two parallel tracks, the north one being for cars going west and the south one for cars going east. At the intersection of Sixteenth and State streets the child was struck and fatally injured by a car going east at about 9 o'clock in the evening of May 21, 1902. The crossing and the street were artificially lighted, so that the motorman on the west-bound car could have seen the child at a distance of three hundred feet east of the crossing could have seen a child approaching his track from the south side of the crossing. Such opportunity was continued as the car approached Sixteenth street and up to the time the child was struck, except as hereafter stated. The car track at the time of the accident was wet and slippery. The circumstances of the accident are as follows: As one of defendant's cars going east upon the south track at a speed of about ten miles per hour was approaching Sixteenth street, another car going west that did the mischief was approaching such street from the opposite direction. Upon the north track at about the same rate of speed, the situation being such as to plainly indicate that they would pass each other, the deceased, accompanied by her brother, a child of about six years of age, approached the south track on the west side of the crossing, walking hand in hand, and somewhat faster than a walk, going skip, as one of the witnesses testified. Between the curb on the north side of the street and the south track and a safe distance therefrom,

apparently seeing the car approaching from the west, and waiting for it to pass. At that time they could have been seen by the motorman on the west-bound car. About as the car passed them it intercepted the line of vision of the motorman on the west-bound car. As soon as the east-bound car passed the children they proceeded toward the north track hand in hand as before, hopping and skipping in a childish manner. They emerged from behind the east-bound car and stepped almost immediately upon the track in front of the west-bound car, so that it was impossible for the motorman thereon to prevent the accident. He did not see the girl and could not have seen her from the time his line of vision was interfered with as aforesaid till she appeared so near the track that he could not, at the speed his car was going, stop it before reaching the point where the injury occurred. As the car approached the crossing the motorman shut off the current and took up the slack of his brake, and also sounded the gong on his car, following the rules prescribed by the company in such situations. As soon as he observed the child on the track he reversed the current and set his brakes, but was so near the girl that the motion of the car was not materially slackened before striking her. There was evidence tending to show that under ordinary conditions such a car could be stopped in going about sixty feet. There was no evidence as to the speed a car should be going under the circumstances of the accident in order that the motorman might stop it in case of a child suddenly appearing upon the track in front of it, in time to prevent injuring the child.

At the close of the evidence the trial court, on motion, directed a verdict in favor of the defendant, holding that the evidence was insufficient to show want of ordinary care upon the part of the motorman who had charge of the car.

Judgment was rendered accordingly.

Hoyt & Lowell (Hoyt, Doe, Umbreit & Lowell, of counsel), for appellant.

Spooner & Rosecrantz, for respondent.

Opinion by MARSHALL, J.

The legal principles applicable to the foregoing statement are too familiar to warrant taking time or space to state them. It goes without saying that it is the duty of a motorman in charge of an electric street car to keep a careful lookout ahead upon and in the vicinity of his track so far as the performance of his other duties will reasonably permit, to the end that he may avoid injuring any person that may accidentally or otherwise place himself in a dangerous situation in the pathway of such car; that the degree of diligence in that regard, in order to come up to the

standard of ordinary care which the law requires, time, place, amount, and character of travel upon the opportunity for the motorman to see persons using the ordinary travel as they approach the track and for him to see the approaching car, and all circumstances naturally tending to increase the hazard of injuring such persons thus indicated, in law, charges the motorman with the use of ordinary care to avoid dangerous consequences within his knowledge, and from those which he might exercise of proper vigilance, have knowledge of as well as bound not only to keep the careful lookout indicated to serve persons approaching the track, or so circumstances suggest a reasonable probability of such approach of danger, whom, consistent with proper attention to his duties, he might observe, and to handle his car, so far as care will permit under all the circumstances, so as not to injure them. Obviously, those principles require a motorman on a street crossing to exercise greater care than between cars, and much more care in case of very young children approaching the track unconscious of an approaching car, or being so stationed as to suggest a probability of such approach, than of adults. The citation of decided cases in respect thereto regards the case before us, would not be of any great benefit, as can be found, we venture to say, characterized by all the elements present in this case. For that reason we shall confine ourselves with a brief reference to principles, omitting the citation of cases. That class of cases where, in exercising care, a child playing near the track at some point other than at a crossing suddenly ran in front of a car; and that where a child standing by the track at a safe distance therefrom, at an approaching car, and notwithstanding his attitude suggested a purpose to go upon the track, he suddenly ran and so near the car that the exercise of ordinary care of the motorman after opportunity existed to see the situation of danger did not enable such motorman to avoid injuring the child; and the class in each of which at some point between crossings, suddenly emerged from behind another car or a team, or some object, interfering with the motorman's seeing him until the dangerous situation was created.

that where in each the motorman observed a child at a crossing approaching the track, watching the car and apparently intending to avoid getting in its way, but who suddenly ran in front of it; and others that might be mentioned, where it was held that the motorman was free from actionable negligence, neither rule nor throw any light upon the controversy in this case. To refer to and discuss them would be more liable to confuse than to solve the question raised by the appeal.

There can be no doubt that it was the duty of the motorman, as his car approached the crossing, to observe children near the track in such an attitude as to suggest a probability of their placing themselves in the way of the car, and to use all reasonable care to avoid injuring them in the event of that probability changing to a certainty. It is no excuse for him, as we have seen, that he did not see the little girl as she was waiting for the east-bound car to pass. The evidence tends to show that he had a good opportunity to see her so circumstanced, apparently unconscious of the approach of his car, when he was not more than about 100 feet from the east side of the street crossing, and 160 feet from her, and when it was his duty to take a view of the crossing, so far as he reasonably could, and to see whatever was observable by the exercise of ordinary attention to his duties, calling, or which might probably call, for action on his part in respect to controlling the movements of his car. If a jury should find, as they might properly from the evidence, that had the motorman performed his duty to observe the appearances at the crossing as he approached it he would have seen the little girl in the attitude of waiting for the east-bound car to pass her, apparently unconscious of the approach of the west-bound car, and suggesting the probability of her attempting to cross the street as soon as the east-bound car passed her, and when she could not see the west-bound car nor the motorman see her till too close upon her to avoid running her down unless during the time she was obscured from his view by the east-bound car he prepared to avoid such danger, could they reasonably find therefrom the further fact that it was a breach of the motorman's duty as regards the safety of the child to operate his car regardless thereof? Assuming, as we must, that a jury might properly find the primary facts mentioned, was the trial court warranted in holding as a matter of law that the motor-

man was not guilty of any actionable fault? It seems a firmative answer is clearly due to the first proposition, and that the trial court was wrong in taking the case from the jury. Evidently it did not give due significance to the fact that the motorist had to have seen the little girl as she was in the attitude for the east-bound car to pass her before his line of vision was cut off by said car; nor due significance to the fact that the elements, situation, and attitude reasonably suggested a state of unconsciousness of the near approach of the west-bound car, and that she purposed proceeding across the tracks as the east-bound car passed her. The circumstance presents cases where the motorman was held free from fault suddenly and without any reasonable ground to expect, on the part of the motorman, emerging from obscurity into danger, did not exist here. Here, while the child emerged from behind the east-bound car and ran in front of the car that injured her, a jury would be justified in saying, as we have indicated, that the motorman had no ground to expect that very event. If he had such ground, he would make any provision to avoid the dangerous consequence which might otherwise be likely to occur might well be found to be inconsistent with the exercise of ordinary care up to the standard of law would pronounce judgment of actionable negligence.

The judgment must be reversed and the cause remanded for a new trial.

So ordered.

Younkin v. Milwaukee Light, Heat & Traction Co.

(Wisconsin — Supreme Court.)

1. **ELECTRIC RAILWAY NOT AN ADDITIONAL SERVITUDE.**—An electric railway, operating within the limits of a city for the purpose of conveying passengers, is nothing more than an improved method of using the street to effect its original design, and is not an addition to the fee of the street.

1. As to street railway as additional servitude upon proper owners, see monographic note, 1 St. Ry. Rep. 311. See also case *Bound R. Co. v. Burton*, ante, p. 867.

- 2. INTERURBAN RAILWAYS IN HIGHWAYS.**—A street railroad upon a public highway between cities is an additional burden which entitles the abutting owners to compensation.
- 3. INTERURBAN RAILWAYS PASSING THROUGH STREETS OF CITY.**—An interurban railway constructed from one city through the streets of another to a terminal point beyond such city is an additional burden upon the street in the city through which it runs, and the abutting owners are entitled to compensation. The abutting owners are entitled to relief by injunction restraining the operation of a street railway in such a street.

APPEAL by plaintiff from judgment for defendant. Decided February 2, 1904.
Reported (Wis.) 98 N. W. 215.

Statement of facts by CASSODAY, C. J.

This action was commenced July 26, 1900, by twenty-six abutting owners on Lincoln avenue, in the city of Waukesha, to abate and remove from that street in front of their respective lots the railway tracks, ties, poles, wires, and other erections of the defendant therein constituting the nuisance complained of, and to restrain the further obstructions or interference therewith. The case was here on demurrer, and was reversed and remanded for further proceedings according to law. 112 Wis. 15, 23, 87 N. W. 861. Thereupon the complaint was amended in the particulars wherein it was held bad in that decision. The defendant answered such amended complaint, and denied that it was a commercial railway to carry baggage or freight, and justified its maintenance of the railway tracks, etc., and its right to use the same and operate its cars thereon, under the statutes of this State therein cited and the ordinances of the city of Waukesha. A trial being had, the court found as matters of fact, in effect: (1) That the plaintiffs were abutting owners as stated. (2) That Lincoln avenue was one of the principal public streets in the city, with desirable lots for residences thereon. (3) That at the time of the commencement of this action the defendant was, and since has been, incorporated under the articles of incorporation in evidence, and has all the rights, title, and interest conferred and granted by said ordinances and amendments. (4) That July 27, 1897, the city, pursuant to section 1862, Sanb. & B. Annot. Stats., and acts amendatory thereof, granted a franchise to the defendant and its successors and assigns incorporated and organized under chapter 86 of the statutes, and sections 1862 and 1863 of chapter 87 of the statutes, and acts amendatory thereof and supplementary thereto, for the purpose of purchasing, acquiring, constructing, equipping, leasing, and maintaining and operating by electricity or other power street railways for the transportation of passengers in the city of Waukesha, and of purchasing, acquiring, taking, holding, and operating real and personal property, rights, privileges, ordinances, and franchises upon certain streets therein, as found by the court. (5) That the defendant holds such rights, franchises, and property by assignment, as it is authorized to do. (6) That the defendant is the legal owner of such rights, franchises, and property, and had before and ever since the commencement

of this action operated such railway under such franchise or that the defendant constructed such double-track electric railway on Lincoln avenue, and operated the same as an electric street railway in the city of Waukesha, and never has and never intended to use said or double track for the purpose of carrying freight or baggage. (6) That the defendant has in all its acts upon said Lincoln avenue and other streets mentioned in said franchise, within the city of Waukesha, kept the authority conferred upon it by said franchise and acts same so far as its business was concerned. (7) That the defendant or its agents entered upon the lots of any of the plaintiffs or upon Lincoln avenue under said rights and franchises. (8) That it has complied with all the conditions and requirements of said franchise. (9) That under such authority the defendant has constructed, maintained, and operated a first-class street railway line on Lincoln avenue in the city of Waukesha, as authorized and required by its franchise and the statutes. (10) That the defendant constructed an electric street car line from the city of Milwaukee to the city of Waukesha, and connected it with its street car line in the city of Waukesha in 1898. That the defendant purchased a line of electric railway from the city of Waukesha on Pewaukee lake known as "Waukesha Beach," about six miles long, from another company, and the defendant connected such line with its street railway in the city of Waukesha, and during the summer months run and operated cars from the city of Milwaukee over and upon said electric line to the city of Waukesha, and across said city of Waukesha and upon said Lincoln avenue in the city of Waukesha to the city of Milwaukee, doing a street car business within that city, and operating a line so purchased to Waukesha Beach; that all of said line was operated by an overhead trolley system throughout its entire length, with poles, charged with a heavy current of electricity; that on or about January 1, 1900, there was only a single track on Lincoln avenue, located in the center of the street, and consisted of T rails laid on wooden ties bedded in the street; that about August 1, 1900, it was removed and a double track was laid on Lincoln avenue, in accordance with the ordinance granted by the city of Waukesha to the defendant; that the defendant interfered with the property of the plaintiffs in some instances less easy than before; that in some portions of the year cars and trains ran over and upon said line over and upon Lincoln avenue in the city of Waukesha without change of cars, once an hour, in accordance with the ordinance granted by the city of Waukesha — except on Sunday during the summer months when cars are frequently run every half hour; that the number of cars so carried exclusively within the city of Waukesha is not large; that the cars that are so run over and upon Lincoln avenue in the city of Waukesha are operated as a regular street car business within that city. (11) That the defendant constructed its single track on Lincoln avenue, and placed it thereon, etc., thereon, without objection from any of the plaintiffs; that no objection was made when the defendant began constructing it

in August, 1900; that no compensation has ever been paid to any of the plaintiffs for the construction of such tracks on Lincoln avenue. As conclusions of law the court found, in effect, that the defendant is entitled to have the plaintiffs' complaint dismissed, and judgment for its costs and disbursements in this action, and ordered judgment accordingly. From the judgment so entered the plaintiffs bring this appeal.

Tullar & Lockney and *Clasen & Walsh*, for appellants.

Ryan, Merton & Newbury (Geo. P. Miller, of counsel), for respondent.

Opinion by CASSODAY, C. J.

It is conceded that the defendant was incorporated, created, and organized under and by virtue of chapter 86 and sections 1862 and 1863 of chapter 87 of the Revised Statutes of this State and the laws amendatory thereof and supplemental thereto, prior to the commencement of this action. It is also conceded that prior to that time, and pursuant to such statutes, the defendant obtained from the city of Waukesha ordinances giving to it "the right to construct, maintain, and operate street railways" upon certain streets therein named in the city of Waukesha, including Lincoln avenue, with single or double tracks. The ordinances required the defendant to construct and operate its railway line and tracks on the surface of the streets, and not to operate the same for any other purpose than that of a passenger railway within the streets of the city of Waukesha, except that they were thereby permitted to carry such personal effects as were usually carried by passengers on street railways, and that the rate of fare thereon should not exceed five cents for each passenger, except where cars are chartered at a special price or for a special purpose. Such line of railway and tracks in the city appear to have been constructed as so prescribed by the city. In view of such facts it is very obvious that under the decisions of this court the defendant had the right to maintain its tracks and railway on Lincoln avenue for the purpose of doing a legitimate street railway business without making compensation to any of the plaintiffs as abutting lotowners. Thus it appears that the decisions of this court culminating in *La Crosse City Ry. Co. v. Higbee*, 107 Wis. 389, 83 N. W. 701, 51 L. R. A. 923, are to the effect that such electric street

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railways, constructed and operated as so prescribed, are more than an improved method of using the street to original design. And so it was there held that:

"A railroad constructed on the grade of a street, and operated to materially interfere with the common use thereof for public ordinary modes, or with private rights of abutting landowners, a purpose of transporting persons from place to place on such street for reasonable convenience, is not an additional burden on the fee if the railroad satisfies the above essentials, regardless of the motive power or how it is applied, if it be strictly a street railroad for the carriage of passengers on the street, taking them on and discharging them at points, and it be so constructed and operated as not to materially interfere with the ordinary modes of using the street for public travel and private rights."

2. A very different question, however, is here presented which appears from the facts stated. It is undisputed that the streetcar was incorporated, created, and organized as stated, and that from the commencement of this action owned and operated a streetcar line from the city of Milwaukee westerly through the county to the easterly limits of the city of Waukesha, where it entered the main avenue, and runs thence in a westerly direction through the city of Waukesha, and thence through the country in a northwesterly direction for a distance of six or seven miles to Waukesha, a summer resort on the shore of Pewaukee lake. Under repeated decisions of this court such street railroad is not a public highway between the cities of Milwaukee and Waukesha. It has been held to be an additional burden, which entitles abutting landowners to compensation therefor. *Chicago Ry. Co. v. Mil., R. & K. El. R. Co.*, 95 Wis. 561, 70 N. W. 37, 38 L. R. A. 856, 60 Am. St. Rep. 136; *Zehren v. The Milwaukee R. & L. Co.*, 99 Wis. 83, 74 N. W. 538, 41 L. R. A. 575, 60 Am. St. Rep. 844. In this last case the question was very fully considered, and it was expressly held that:

"An electric railway for the carriage of passengers between cities is constructed and operated upon a country highway, is an additional burden upon such highway, and its proprietors cannot, even with the consent of the town authorities, granted for the sole purpose of enabling them to cut down the highway so as to seriously impair the rights of the owner to access to his lot, without his consent, or the payment of compensation to him."

See also *Krueger v. Wisconsin Tel. Co.*, 106 Wis. 96, 103-107, 81 N. W. 1041, 50 L. R. A. 298; *Linden Land Co. v. Mil. El. Ry. & L. Co.*, 107 Wis. 493, 511-513, 83 N. W. 851; *Allen v. Clausen*, 114 Wis. 244, 249, 90 N. W. 181. Of course, the same is true as to the defendant's line of railway from the city of Waukesha to Waukesha Beach. It is conceded that the rule stated is applicable to the whole line from the city of Milwaukee to Waukesha Beach, except within the limits of the city of Waukesha. The defendant claims the right to run its trains and cars from the city of Milwaukee directly through the city of Waukesha and to Waukesha Beach. In doing so it is conceded that, while such trains or cars are interurban, they do cast an additional burden on the lands of abutting owners, which entitles them to compensation; but it is claimed that the moment such trains or cars pass into the city of Waukesha they cease to cast any such additional burden upon the lands of such abutting owners. And yet such trains or cars may be loaded with through passengers. The only difference is that while in the city of Waukesha such trains or cars, in obedience to requirements, stop at street crossings, whereas in the country they only stop when convenient, or at points remote from each other. Counsel for the defendant argues that as a train or cars with passengers from Milwaukee might, at the city limits of Waukesha, change from such interurban cars to regular street cars, and then at the westerly limits of the city again change into interurban cars, that, therefore, it is substantially the same as though the interurban train or cars should continue with its passengers directly through the city; especially as the ordinance expressly authorized the street railway to connect with the interurban railway. While such argument may be plausible, yet it is really begging the question. It might be argued on the same theory that a commercial railway passenger train, with the permission of the city, might be run over the street railway tracks without compensation to the abutting lotowners. We must hold that the running of such interurban trains and cars over the street railway tracks upon Lincoln avenue was an additional burden upon the lands of the plaintiffs as such abutting lotowners.

3. Counsel for the defendant contend that the question is not properly before us on this appeal; that, if the running of such through cars on Lincoln avenue was improper, then that it was

rate of twenty-five or thirty miles an hour. There was evidence to the effect that its speed was not materially lessened as it approached the crossing. The motorman admitted that he saw the team of the decedent approaching the tracks at a distance of about 230 feet from the crossing. The team which the decedent was driving was frightened and everything indicated that they were running away. It was held that these facts were sufficient to warrant a submission to the jury of the question of the gross and wanton negligence of the defendant.

2. DUTY OF MOTORMAN TO CONTROL CAR SO AS TO AVOID COLLISION WITH UN-MANAGEABLE TEAM APPROACHING CROSSING.²—If a motorman in charge of an electric car going at a high rate of speed sees a runaway team approaching a crossing under such circumstances as must suggest to any mind that a collision is probable, and makes no effort to control or stop his car, but allows it to run down the team and driver, he is guilty of that wanton and reckless disregard of human life which amounts in the law to intentional wrong.

3. PROOF OF WANT OF ORDINARY CARE WHERE GROSS NEGLIGENCE IS CHARGED.—Where it is alleged that the damages sought to be recovered resulted from the gross negligence of the motorman, proof of want of ordinary care on his part will not justify a recovery. Where gross negligence is charged there must be shown either a willful intent to injure, or that reckless and wanton disregard of another's rights and safety, and that willingness to inflict injury, which the law deems equivalent to an intent to injure.

APPEAL by plaintiff from judgment for defendant. Decided February 23, 1904.
Reported (Wis.) 98 N. W. 536.

Statement of facts by WINSLOW, J.

At 4 o'clock, P. M., on the 14th day of December, 1901, one David Wilson, while crossing the defendant's track in a sleigh drawn by two horses, was run down and killed by one of defendant's electric cars, and this action is brought by his widow and administratrix to recover damages for his death. The complaint charges gross negligence, or, more accurately, such willful and wanton acts as amount to intentional killing. A verdict for the defendant was directed at the close of the evidence, and the plaintiff appeals from judgment thereon.

The evidence showed that the place where the accident took place was a highway crossing known as "Smith's Crossing." Though within the city limits of Eau Claire, it was so far on the outskirts as to be practically a country

2. As to duty of motorman to control car at street intersection, see note to *Searles v. Elizabeth, P. & C. J. Ry. Co.*, *ante*, p. 706. As to liability of company for failure of motorman to operate car so as to avoid collision with unmanageable horses frightened by the car, see note to *Lincoln Traction Co. v. Moore*, *ante*, p. 642.

crossing. At this point the defendant's track runs northeast and southwest; the same being an interurban line between the cities of Eau Claire and Chipewewa Falls, over which the defendant operated cars at stated intervals. The track was upon a fenced right of way, and both track and right of way were in all essential respects maintained like those of the ordinary railroad. Immediately adjoining and parallel to the right of way upon the southeast was the right of way and track of what is commonly called the "Omaha Railway," and immediately adjoining this, again, was the track and right of way of the Wisconsin Central Railway; the track of the Omaha Road being ninety-six feet from the defendant's track, and the track of the Central being 137 feet from the Omaha track. The highway on which the deceased was driving ran directly east and west, crossing all three of the tracks at grade. The car which ran down the plaintiff was approaching the crossing from the northeast, and was an interurban car, going at from twenty to twenty-five miles per hour. The deceased, with one Howard, was approaching the crossing from the east. The day was cold, and both men were well muffled up. The horses were owned by the deceased, and were young and high-spirited, and had run away at least twice before; the last time being on the day of the accident. It appears that, from the time when a traveler approaching the tracks from the east reaches a point 150 feet east from the defendant's track up to the time when he crosses the track, he has an unobstructed view to the north, and can see a car approaching for more than a mile, and can, of course, himself be seen from the car. The plaintiff introduced evidence tending to show that the team which the deceased was driving got beyond his control and commenced to run away just before reaching the Wisconsin Central track, at a point about 313 feet east of the crossing over the defendant's track, and that they continued running away till they crossed the defendant's track; that at the time they commenced to run, or when first seen running, the defendant's car was about 350 feet north of the crossing; that the defendant's motorman saw Wilson's team approaching, and made no attempt to stop his car until after it had struck the sleigh in which the deceased was riding. On the other hand, the defendant's evidence tended to show that the team did not commence to run until it passed the Omaha track, and that the motorman attempted to stop the car when he saw the team commence to run. It was undisputed that the car struck the sleigh, throwing one of the men a distance of thirty-seven feet, and the other a distance of fifty-three feet, killing them both, and that the car ran several hundred feet beyond the crossing before stopping.

Wickham & Farr, for appellant.

Frawley, Bundy & Wilcox, for respondent.

Opinion by WINSLOW, J.

The complaint charges that the defendant's agents wantonly and willfully ran the deceased down, with such gross negligence as

to amount to an intention on their part to inflict injury on the deceased. The action was tried on the theory that these facts must be shown. The trial court directed a verdict because it deemed that there was no credible evidence tending to show such facts, and the question now presented is whether this direction was right. We are convinced that this question must be answered in the negative. There were ten or more passengers in the car as it approached the place of accident. It is admitted that it was running at a speed of from twenty to twenty-five miles an hour. It is an unquestioned fact that, as the car approached the crossing from the northeast, the deceased, in his sleigh, was approaching the crossing from the east, and that both car and sleigh reached the crossing at the same instant of time, and that at that time the speed of the car had been only slightly diminished, if diminished at all. It is admitted also by the motorman that he saw the team of the deceased coming from the east just as it approached the Wisconsin Central track, being something over 230 feet from the crossing in question, though he says they were then trotting, and did not commence to run until they had crossed the Omaha track, when he at once shut off the current, set the brake, and put on the reverse current. Doubtless, if the evidence stopped here, we should be obliged to affirm the ruling of the trial court, for it could not be said from these facts that there was anything which showed either intentional injury on the part of the motorman, or that degree of reckless disregard of consequences indicating a willingness to injure which is equivalent in the law to an intent to injure. A motorman is not obliged to check his speed or stop his car every time he sees a team approaching which is under control. *Eastwood v. Railway Co.*, 94 Wis. 163, 69 N. W. 651. But there is other testimony in the case which must be considered. A young man named Peck was one of the passengers on the car, and was sitting toward the rear end, on the east side. He testifies that as the car approached the crossing, and was about 350 feet distant therefrom, he looked over his shoulder out of the window of the car, and saw the deceased and his team at a point just opposite the bicycle arch (a structure on the south side of the highway), being by measurement eighty feet east of the Central crossing, and 313 feet east of the defendant's crossing; that the

team was then frightened, and running west toward that everything indicated that they were running away running too fast to be running for the fun of it; that got right up and started for the front end of the looked at the motorman as he was walking to the front end of the car, he looked out again at the team were just coming over the Omaha track, still running turned, and looked at the motorman again, and he was going to stop the car; then in an instant came the collision looked out of the window on the other side of the car, team running down the street with the pole and whiff There was evidence by other witnesses to the effect that the man did nothing to stop the car until almost the collision, or the moment after the collision. If these are the facts, they furnish ample basis for the conclusion that the motorman was guilty of a gross and wanton reckless driving of his car, which amounted to an utter disregard of life and limb, and thus was within the rule of gross negligence recently laid down in the case of *Bolin v. Railway Co.* 333, 84 N. W. 446, 81 Am. St. Rep. 911. The motorman testified that he actually saw the team just as they were coming over the Central track, about 230 feet east of the fatal crossing also testifies that they were then under control. It can be admitted by all that if the motorman in charge of the car going at a high rate of speed sees a runaway team approaching a crossing under such circumstances as must suggest to his mind that a collision is probable, and makes no effort to stop his car, but allows it to run down the team and is guilty of that wanton and reckless disregard of human life which amounts in the law to intentional wrong. On this question there is no room for two opinions.

It seems to have been the idea of the trial court that because the witness Peck admittedly did not see the team from the point 313 feet east of the crossing until it was over the Omaha crossing (a distance of 217 feet), and because the witness testified that he saw the team between these two points that they were not running, but going at a trot, the

team was running away at any point during the progress of the 217 feet is disproven. We cannot agree with this contention. If Peck's story is to be believed (and his testimony is certainly not intrinsically incredible, nor is it conclusively disproven), then the facts were that both team and car were approaching this crossing at about the same speed, namely, between twenty and twenty-five miles an hour; that when the team was 313 feet distant it was running away; that when ninety-six feet distant it was running away; that it reached the crossing at the identical moment that the car reached the crossing. These facts certainly would justify the inference that the team was running away during the whole 313 feet, because it must have kept up its speed, and testimony that it was walking or only slowly trotting for a part of the time would not necessarily overcome the inference. So we arrive at the conclusion that the case was one for the jury, and that the direction of a verdict for the defendant was erroneous.

Another contention made by the plaintiff is that in any event there was testimony in the case showing a want of ordinary care on the part of the motorman, and that there might be a recovery on this ground, even though gross negligence or intentional wrong was not proven. It is true that some courts have held that, notwithstanding gross negligence is charged, there may be a recovery on the ground of want of ordinary care only. *Keating v. Railroad Co.*, 104 Mich. 418, 62 N. W. 575; *Hays v. Railway Co.*, 70 Tex. 602, 8 S. W. 491, 8 Am. St. Rep. 624; *Claxton's Admr. v. Railroad Co.*, 13 Bush, 636; *Railway Co. v. Phillips*, 66 Ill. 548. On the other hand, a number of courts have arrived at the opposite conclusion. *Railroad Co. v. Winn*, 93 Ala. 306, 9 So. 509; *Railway Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807. This court has held that, where the complaint simply charges negligence or want of ordinary care, there can be no recovery on the ground of willful injury, or that reckless and wanton disregard of another's rights equivalent to willful injury, which has been termed "gross negligence," because this is a different cause of action. *McClellan v. C. V. E. R. Co.*, 110 Wis. 326, 85 N. W. 1018. Is the converse of the proposition true? We think it must logically be so held. In the case of *Bolin v. Railway Co.*, *supra*, this court very carefully examined the doctrine of gross negligence, and reviewed the authorities on the subject. The conclusion there reached was that

there had been inaccuracy at times in the decisions in the term "gross negligence;" that whenever negligence so called, was the foundation of the action, contributor on the part of the plaintiff would defeat a recovery how great the negligence of the defendant; that, constitute "gross negligence," as it has been called (degree of misconduct for which a recovery may be had standing contributory negligence), there must be shown either a willful intent to injure, or that reckless disregard of another's rights and safety, and that which inflicts injury, which the law deems equivalent to an injury. It was shown that in a wrong of this nature there is no element of inadvertence, which is a necessary element of negligence, and hence that the term "gross negligence," as applied to this class of wrongs, is inaccurate. The conclusion that this kind of a wrong is charged, as in the present case, it be called "gross negligence," it does not logically imply ordinary negligence, any more than a charge of ordinary negligence includes intentional wrong, and hence the appellant's contention in this regard must fail.

It is not deemed necessary to discuss any other question.
Judgment reversed and action remanded for a new trial.

Hogan v. Winnebago Traction Co.

(Wisconsin — Supreme Court.)

COLLISION WITH VEHICLE DRIVEN ON TRACK IN FRONT OF CAR;¹ CONTRIBUTORY NEGLIGENCE.—The driver of a horse-drawn buggy in which the plaintiff was riding drove upon the tracks of a street car at a street crossing at a point where a car could be seen at a distance of ninety-five feet. The car was approaching at seven miles an hour. It stopped as it touched the buggy. As the plaintiff saw the car approaching she jumped out of the buggy and was injured. From the evidence it was held that the plaintiff was guilty of contributory negligence precluding the plaintiff from recovery.

1. As to contributory negligence in driving upon a track in front of an approaching car, see note to *Roefeldt v. St. Louis & Sub. Ry. Co.*

This is an action to recover for personal injuries sustained by the plaintiff by reason of a collision between the defendant's street car and a carriage in which she was riding. It is alleged that the defendant's employees were negligent in driving the car at a high rate of speed exceeding the rate fixed by the city ordinance, and in failing to ring the bell or give any warning. It appeared by the evidence that the defendant operates an electric street railway in the city of Oshkosh; that one of its lines runs south on South Main street, and turns west to Ninth street at a right angle; that on the north-west corner of said intersecting streets there is a two-story brick store; that the city ordinance of the city of Oshkosh prohibits a greater speed than five miles an hour around curves; that at about 8 o'clock, P. M., Sunday evening, August 17, 1902, the plaintiff, a young girl, was taking a ride through the streets of Oshkosh in a single buggy with her sister and one R. J. Cole, the buggy being drawn by one horse, and Mr. Cole being the driver; that they were driving east on Ninth street toward Main street, the horse walking, and being upon the left side of the street railway track; that as they were still about thirty feet west of the west line of Main street Cole turned the horse onto the track in order to cross onto the right side of the street, and that at about the same time a train of three cars came into sight on Main street from behind the building, having a brightly lighted headlight; that the leading car was at a distance from the buggy of about seventy-six feet in a direct line and ninety-five feet around the curve of the track; that Cole endeavored to back his horse off from the track, and the motorman put on the brakes to stop the car. The driver, Cole, testifies as follows: "The top of the buggy was half down. It was a nice, quiet, pleasant summer evening. From where we started to cross the track you can just see around the curve. You can't see very far on account of that brick building. I should judge the car was within about 100 feet of me when I see it, and as soon as I saw it I attempted to back off the track. The horse was not unruly. The train made no noise that I heard. We were not making much noise in the buggy, nor was the buggy or horse making much noise. My hearing is not defective, and my eyesight is not defective. I was looking east toward South Main street at the time I started to cross the track. The train came to a full stop at about the front wheel of the buggy." It appears further from the testimony that the forward car struck the horse slightly, without inflicting any serious injury, and touched the buggy sufficiently so that it tipped to one side, and plaintiff jumped out of the buggy, breaking her leg and suffering other injuries. The buggy was not injured.

The jury returned the following special verdict: "(1) Was the plaintiff injured at the time and place alleged? Answer by the court. Yes. (2) At what rate of speed were the cars running in turning the corner from South Main street onto Ninth street at the time alleged? Answer. Seven miles per hour. (3) Was the bell or gong sounded before turning the corner from South

Main street onto Ninth street? Answer. No. (4) Was the lights on the car burning when the train went onto Ninth street? Answered by the court. Yes. (5) Ought the motorman, in the ordinary care, to have seen the plaintiff in time to have avoided contact with the buggy? Answer. Yes. (6) Did the motorman see the train as soon as it was apparent that there might be a collision? Answer. Yes. (7) Ought the person driving the horse, in the exercise of ordinary care and prudence, to have seen or heard the cars in time to avoid contact with them? Answer. No. (8) Did the defendant exercise ordinary care and prudence in the operation of the train at the time of the accident? Answer. No. (9) If you answer 'No,' then was such want of ordinary care and prudence the proximate cause of plaintiff's injury? Answer. Yes. (10) Was the plaintiff's injury caused by want of ordinary care which contributed to her injuries? Answer. Yes. (11) Was the person driving the horse guilty of any want of ordinary care which contributed to the plaintiff's injuries? Answer. No. (12) Should the court be of the opinion that the plaintiff is entitled to recover damages? Answer. Yes. (13) How much do you assess her damages? Answer. \$1,500." The court then struck out the answers to questions Nos. 3, 7, 10, and 11 as being immaterial, and thereupon entered judgment upon the verdict of the jury, and the plaintiff appeals.

Phillips & Hicks, for appellant.

Weed & Hollister, for respondent.

Opinion by WINSLOW, J.

We think the trial court was right in setting aside the verdict of the jury to the seventh, tenth, and eleventh questions, and entering judgment for the defendant. It seems to us that the admitted facts show that the driver of the car was guilty of contributory negligence. The place where the car turned his horse upon the track was not in dispute. It was about thirty or thirty-five feet west of the line of the track. At this point the cars coming down Main street could not have been seen when at a distance of ninety-five feet measuring along the curve of the track. The horse was gentle and under control. The train was going (as found by the jury) at the rate of ten miles per hour. The horse was walking. The train stopped in front of the buggy, without injuring it. All these facts are admitted in the case. Now, when Cole drove upon the track to the injury of the plaintiff, either in sight or it was not in sight. If in sight, he was negligent in not looking, which was negligence, or he looked and did not stop, which was negligence.

drove on with knowledge of the approach of the train, and thus assumed the risk. If the train was not in sight when he drove on the track, then it is a demonstration that he must have allowed his horse to stand upon the track and wait for the train to run him down. The train was going at the rate of seven miles an hour. It traveled more than ninety-five feet under the last supposition, and its speed was constantly diminishing till it came to a standstill, and during all this time the horse was allowed by his driver to stand on or near the track. During the time that the train was proceeding ninety-five feet, granting that a horse walks more than three miles an hour, the horse could have walked at least forty feet, and could easily have been beyond all danger. The physical facts which are verities in the case, and incapable of being explained away, demonstrate the contributory negligence of the driver beyond dispute. In this view of the case no other question need be considered.

Judgment affirmed.

Champagne v. La Crosse City Railway Co.

(Wisconsin — Supreme Court.)

1. **INJURY TO PASSENGER ALIGHTING FROM CAR BY PREMATURE START; WEIGHT OF EVIDENCE.**—The plaintiff was a passenger on one of the street cars of the defendant and gave notice to the conductor that she wished to get off the car at a certain crossing; the car stopped and the plaintiff arose from her seat, went upon the platform, and was in the act of
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PASSENGERS INJURED WHILE ALIGHTING.

1. In general.
2. Reasonable time for alighting.
3. Passenger to notify employee of intention to alight.
4. Start of car while passenger is in act of alighting.
5. Passenger alighting while car is in motion.
 - a. In general.
 - b. Taking position on steps preparatory to alighting.
 - c. Effect of failure of employee to stop car.
 - d. Effect of ordinance to stop at street crossing.
6. Safe place for alighting.

1. In general.—Injuries resulting to passengers while attempting to alight from street cars are very frequently made subjects of actions against street railway companies. This fact is evidenced by the number of cases reported

alighting from the last step when the car started, causing her to fall into the street. The defendant's testimony sharply contradicted that of the plaintiff and her mother, with whom she was riding on the car, and was to the effect that the plaintiff alighted from the car before the car had stopped. The evidence was considered and held sufficient to justify a verdict in favor of the plaintiff.

2. INSTRUCTION AS TO ATTEMPT TO ALIGHT WHILE CAR WAS IN MOTION.—An instruction to the effect that if the jury believe that after the car had

in this and the preceding volume of this series. See *Indianapolis St. Ry. Co. v. Brown*, 2 St. Ry. Rep. 250, (Ind. App.) 69 N. E. 407; *Ft. Wayne Tract. Co. v. Morvilius*, 2 St. Ry. Rep. 221, (Ind. App.) 68 N. E. 304; *Spalding v. Quincy & B. St. Ry. Co.*, 2 St. Ry. Rep. 441, (Mass.) 69 N. E. 217; *Mead v. Boston Elev. Ry. Co.*, 2 St. Ry. Rep. 456, (Mass.) 70 N. E. 197; *Hastings v. Boland*, 2 St. Ry. Rep. 503, (Mich.) 98 N. W. 1017; *Scamell v. St. Louis Transit Co.*, 2 St. Ry. Rep. 626, (Mo. App.) 77 S. W. 1021; *Peck v. St. Louis Transit Co.*, 2 St. Ry. Rep. 508, (Mo.) 77 S. W. 736; *Lynch v. St. Louis Transit Co.*, 2 St. Ry. Rep. 662, (Mo. App.) 77 S. W. 100; *Hannon v. St. Louis Transit Co.*, 2 St. Ry. Rep. 624, (Mo. App.) 77 S. W. 158; *Dawson v. St. Louis Transit Co.*, 2 St. Ry. Rep. 625, (Mo. App.) 76 S. W. 689; *Brazie v. St. Louis Transit Co.*, 2 St. Ry. Rep. 626, (Mo. App.) 76 S. W. 708; *Duffy v. St. Louis Transit Co.*, 2 St. Ry. Rep. 626, (Mo. App.) 78 S. W. 831; *Paganini v. North Jersey St. Ry. Co.*, 2 St. Ry. Rep. 731, (N. J. L.) 57 Atl. 128; *San Antonio Traction Co. v. Welter*, 2 St. Ry. Rep. 900, (Tex. Civ. App.) 77 S. W. 414; *Richmond Traction Co. v. Williams*, 2 St. Ry. Rep. 927, (Va.) 46 S. E. 292; *Champagne v. LaCrosse City Ry. Co.*, 2 St. Ry. Rep. 988, (Wis.) 99 N. W. 334; *Boone v. Oakland Transit Co.*, 1 St. Ry. Rep. 14, (Cal.) 73 Pac. 243; *Denver Consol. Tram. Co. v. Rush*, 1 St. Ry. Rep. 30, (Colo. App.) 73 Pac. 664; *Henning v. Louisville Ry. Co.*, 1 St. Ry. Rep. 238, 24 Ky. L. Rep. 2419, 74 S. W. 209; *Leveret v. Shreveport Belt Line Co.*, 1 St. Ry. Rep. 254, and note, (La.) 34 So. 579; *United Rys. & Elec. Co. v. Woodbridge*, 1 St. Ry. Rep. 281, and note, (Md.) 55 Atl. 444; *Joslyn v. Milford, etc., Ry. Co.*, 1 St. Ry. Rep. 323, (Mass.) 67 N. E. 866; *Lee v. Elizabeth, etc., Ry. Co.*, 1 St. Ry. Rep. 539, (N. J. L.) 55 Atl. 106; *Koues v. Metropolitan St. Ry. Co.*, 1 St. Ry. Rep. 602, 86 App. Div. (N. Y.) 611, 83 N. Y. Supp. 380; *Gillespie v. Yonkers R. Co.*, 1 St. Ry. Rep. 644, 87 App. Div. (N. Y.) 38, 83 N. Y. Supp. 1043; *Memphis St. Ry. Co. v. Shaw*, 1 St. Ry. Rep. 771, (Tenn.) 75 S. W. 713; *Fuller v. Denison & S. Ry. Co.*, 1 St. Ry. Rep. 780, (Tex. Civ. App.) 74 S. W. 940.

The duty imposed upon a common carrier to exercise the utmost care and diligence of very cautious persons to protect passengers from injuries continues and is enforceable until the status of carrier and passenger has been terminated. In respect to street railway companies the relation of carrier and passenger does not cease until the passenger has had a reasonable opportunity to leave the car at the place where his journey ends and passengers are discharged. The relationship continues until the passenger has safely alighted from the car and has reached a point over which the company has

stopped and started again the plaintiff attempted to alight while it was in motion, and that, by reason of attempting to alight while the car was in motion, she fell, is not objectionable as misleading, in that it includes elements wholly immaterial and not necessary to be passed upon by the jury to acquit the defendant of liability, where the court in different parts of its charge had stated the rule unqualifiedly that if a passenger undertakes to alight from a car while in motion, and is injured in getting off the car, he cannot recover for damages sustained.

no control. The cases bearing upon the question as to the termination of the relationship are cited and considered in *Nellis Street Railroad Accident Law*, pp. 45-47. After a passenger has departed from the car and has had reasonable time and opportunity to avoid further danger from the operation of the car, or other necessity of relation with the servants of the carrier, he ceases to be a passenger and stands toward the carrier as one of the general public. 6 Cyc. 542, and cases cited. The relation does not continue during the passage from the car to the sidewalk after a safe footing upon the street is once obtained (*Platt v. Forty-second St., etc., R. Co.*, 2 Hun (N. Y.), 124), unless there are obstructions or defects in the street which have been placed there or caused by the street railway company. *Wells v. Steinway Ry. Co.*, 18 App. Div. (N. Y.) 180, 45 N. Y. Supp. 864.

2. Reasonable time for alighting.—It is the duty of a railroad company to stop its train at a station a reasonable time so that passengers may get off its cars with safety to themselves. *Carr v. Eel River, etc., Co.*, 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354. A reasonable time must be given them to leave the car with safety. *Cincinnati, etc., Ry. Co. v. Richardson*, 14 Ky. L. Rep. 367; *Louisville & N. R. Co. v. Abell*, 14 Ky. L. Rep. 239; *Chicago, etc., R. Co. v. Landauer*, 36 Nebr. 642, 54 N. W. 976; *Murphy v. Rome, etc., R. Co.*, 56 Hun (N. Y.), 645, 10 N. Y. Supp. 354. Where the evidence is conflicting as to the time which the train stopped, the question as to whether the train stopped a reasonable time to allow passengers to alight is for the jury. *Pennsylvania R. Co. v. Lyons*, 129 Pa. St. 113, 18 Atl. 759, 15 Am. St. Rep. 701.

The rule limiting the duty of persons in charge of railroad trains to the requirement that such trains shall stop a reasonable length of time for passengers to alight has in some jurisdictions been applied to the operation of street cars; and it is there held that a street railway company is not liable for an accident to a passenger received in attempting to alight from a car after it has started, where it has stopped a reasonable time for passengers to get off, and all intending to get off have apparently done so, and the conductor is not aware of the passenger's intention to leave the car. *Gilbert v. West End St. Ry. Co.*, 160 Mass. 403, 36 N. E. 60; *Jackson v. Grand Ave. Ry. Co.*, 118 Mo. 199, 24 S. W. 192; *Losee v. Watervliet T. & R. Co.*, 63 Hun (N. Y.), 404, 18 N. Y. Supp. 297. But in other jurisdictions it seems to have been held that the fact that a car was stopped a reasonable length of time, and that the driver supposed that all the passengers had alighted, does not relieve the company from liability for injuries to a passenger at-

Statement of facts by SIEBECKER, J.

This is an action for personal injuries resulting from a defendant's street cars in the city of La Crosse. Sophia Cl
panied by her mother, was a passenger on the car on the 3d da
She desired to get off the car at the intersection of George an

tempting to alight, caused by the starting of the car; in s
the duty of a street railway company before starting in
know that no passenger is in the act of alighting. Ande
St. R. Co., 12 Ind. App. 194, 38 N. E. 1109; Memphis St. Ry
St. Ry. Rep. 771, (Tenn.) 75 S. W. 713. And see cases cite
Ry. Rep. 773.

While a street car company is not bound to stop its ca
of a block to permit its passengers to alight, if it does so
it is bound to use the utmost diligence for their safety in
afford them a reasonable time in which to do so. West Chi
v. Buckley, 102 Ill. App. 314, affirmed, 200 Ill. 260, 65 N.
case of Smith v. Kingston City R. Co., 55 App. Div. (N. Y.
Supp. 185, affirmed, 169 N. Y. 616, 62 N. E. 1100, it was hel
alighting from a street car should be given time enough to s
to clear her skirts from any obstruction on the platform upon
have caught; if the conductor starts the car the instant sh
she has had time to release her skirts from such obstruct
dragged along by the car and injured, the railroad company
injuries thus sustained; the fact that the passenger wore
that it would be likely to catch upon such appliances as n
above the platform is not negligence as a matter of law.
v. Broadway & Seventh Ave. R. Co., 61 N. Y. 621, in which
in attempting to alight from a street car caught her skirt u
the platform and she was thrown down, and by the sudden
dragged along and injured. It was held that the company
the conductor of the car did not give the plaintiff a reason
tunity to alight.

3. Passenger to notify employee of intention to alight.—
as the car is about to start, attempts to alight from the car
ing the conductor of his intention, and in doing so is throw
it is contributory negligence on his part and he cannot recove
v. Quincy & B. St. Ry. Co., 2 St. Ry. Rep. 441, and note, (C
217.

In the case of Sirk v. Marion St. Ry. Co., 11 Ind. App. 68
it appeared that the plaintiff gave a signal to the motorma
the car had almost come to a stand, she stepped upon the pl
another signal which she thought was a signal to stop; the
started forward with a jerk and the plaintiff was thrown th

and would, according to custom, alight at the north line of the intersection of the streets. Plaintiff testified that she notified the conductor of her wish to get off, that the car stopped at the crossing, and that she was in the act of stepping off, when the car started with a sudden jerk, which caused her to be thrown to the ground. Her mother accompanied her on the trip, but did not attempt to get off the car at the crossing in question. She testifies that the car stopped; that two passengers arose and left the car at the crossing; that her daughter, the plaintiff, immediately arose and followed them, but

injured. It was not shown that the motorman or conductor knew of her danger, or that the second signal was necessary, or that it was a signal to stop, and not the regular signal for starting the car. It was held that the plaintiff's injuries were caused by her own act.

A person who gets off from a moving street car without notifying the conductor of his intention, or without making any effort by signal or otherwise to have the car stopped, cannot recover for injuries received in so doing. *White v. West End St. R. Co.*, 165 Mass. 552, 43 N. E. 298. And even where, after a street car has stopped at a place where passengers were not usually permitted to alight, and a passenger attempts to get off without giving notice of his intention, the company will not be chargeable with negligence in starting the car before she has alighted, where it appears that the driver did not know that she was intending to get off. *Chicago W. D. Ry. Co. v. Mills*, 91 Ill. 39.

4. Start of car while passenger is in act of alighting.—When a car has stopped at a usual place of stopping and the persons operating the car knew or should have known by the exercise of proper care that a passenger was in the act of alighting, it is negligence to start the car before the passenger has completed the act and reached a position where injuries cannot result from starting the car. In the case of *Birmingham Union Ry. Co. v. Smith*, 90 Ala. 60, 8 So. 86, 24 Am. St. Rep. 761, the court lays down the following proposition: "The driver of a street car when signaled to stop, must ascertain who and how many of his passengers intend to alight at that place, and must wait a sufficient length of time to enable them to alight in safety by the exercise of reasonable diligence, and must in any event see and know that no passenger is in the act of alighting, or is otherwise in a position which would be rendered perilous by the motion of the car, when he again puts it in motion. If he fails in any of these respects, and injury results therefrom his employer is liable."

It is negligence for a street car to start when a passenger is alighting, though the passenger did not request the stopping, and the driver had reason to believe she was not going to alight at that place. *Chicago W. D. R. Co. v. Mills*, 105 Ill. 63. It is the duty of the employee before starting the car to see and know that no passenger is in the act of alighting. *Anderson v. Citizens' St. R. Co.*, 12 Ind. App. 194, 38 N. E. 1109. See also *Chicago City Ry. Co. v. Mumford*, 97 Ill. 560; *Conway v. New Orleans, etc., R. Co.*, 46 La. Ann. 1429, 16 So. 362; *Jackson v. Grand Ave. Ry. Co.*, 118 Mo. 199, 24 S. W. 192; *Monroe v. Third Ave. R. Co.*, 50 N. Y. Super. Ct. 114.

that the car started while she was in the act of stepping from the car step to the street; that, after the car had passed on for a considerable distance, she observed plaintiff in the act of rising from her fallen position in the street and going to the sidewalk. The evidence of four other passengers is that the car was in motion when plaintiff arose to leave the car, and that she stepped off the car while it was in motion. There were two conductors on the car, who testify that she left the car while it was in motion. A witness upon the street stated that she observed plaintiff in the act of getting off the car,

The duty resting upon a carrier involves the obligation to deliver its passenger safely at his desired destination, and that involves a duty of observing whether he has actually alighted before the car is started again. If the conductor fails to attend to this duty and does not give the passenger time enough to get off before the car starts, it is necessarily this neglect of duty which is the primary and proximate cause of the accident, if injury be occasioned thereby to the passenger. It is not a duty due to a person solely because he is in danger of being hurt, but it is a duty owed to a person whom the carrier has undertaken to deliver, and who was entitled to the delivery safely by being allowed to alight without danger. *Washington & G. R. Co. v. Tobriner*, 147 U. S. 571, 583, 13 Sup. Ct. 557, 37 L. Ed. 284. See also *Birmingham R. & E. Co. v. Weldon*, 119 Ala. 547, 24 So. 548; *Springfield Consol. R. Co. v. Hoeffner*, 176 Ill. 634, 51 N. E. 884; *West Chicago St. R. Co. v. Manning*, 170 Ill. 417, 48 N. E. 958; *Leavenworth Elec. R. Co. v. Cusick*, 60 Kan. 590, 57 Pac. 519; *Louisville R. Co. v. Rammacker*, 21 Ky. L. Rep. 250, 51 S. W. 175; *Grace v. St. Louis R. Co.*, 156 Mo. 295, 56 S. W. 1121; *Cobb v. Lindell R. Co.*, 149 Mo. 135, 50 S. W. 310; *Fenig v. N. J. St. Ry. Co. (N. J.)*, 46 Atl. 602; *Morrison v. Charlotte, etc., Ry. Co.*, 123 N. C. 414, 31 S. E. 720.

If a car is stopped at a place other than the usual stopping place a passenger may assume that the car was so stopped for the purpose of permitting passengers to alight; and if the car is negligently started by the motor-man before such passenger has alighted, and he is injured thereby, the company is liable for negligence. *North Chicago St. Ry. Co. v. Brown*, 178 Ill. 187, 52 N. E. 864. See also *United Rys. & Elec. Co. v. Hertel*, 1 St. Ry. Rep. 273, (Md.) 55 Atl. 428, in which case it appeared that the car had stopped in front of a schoolhouse at a point about fifty feet from a street corner; a warning was posted in the car notifying passengers that cars stopped for them to alight at cross streets. It was held that this notice did not excuse the neglect of the conductor in starting the car before the plaintiff had finally alighted; notwithstanding such a regulation, if a car stops at an unusual place it is the duty of the conductor to warn the passengers or see that none of them are in the act of alighting before the car is again put in motion. *Atlanta Ry. Co. v. Randall*, 117 Ga. 165, 43 S. E. 412.

The conductor must be alert to see that no one is alighting or attempting to alight before he starts his car, and his absorption in other duties will

and that the car had been started from the crossing and had moved for some distance before she fell. There was evidence tending to show that plaintiff fell off the car at a distance of from forty to sixty feet beyond the crossing. The jury returned a general verdict finding for the plaintiff, and assessing her damages at the sum of \$1,225. Before verdict, defendant moved for a direction of a verdict in its favor. The motion was denied. After verdict, the defendant moved for a new trial upon the ground, among others, that the verdict was contrary to the law and the evidence, and that it was, therefore,

aggravate rather than excuse the charge of negligence in starting while a passenger is attempting to alight. *Metropolitan R. Co. v. Jones*, 1 App. D. C. 200, 21 Wash. L. R. 646.

The sudden starting of a car while a passenger is in the act of alighting raises a presumption of negligence on the part of the company which, if unexplained, is sufficient to justify a submission of the case to the jury. *Denver Consol. Tram. Co. v. Rush*, 1 St. Ry. Rep. 30, (Colo. App.) 73 Pac. 664. See also *Harris v. Union Ry. Co.*, 69 App. Div. (N. Y.) 385, 74 N. Y. Supp. 1012; *Willis v. Metropolitan St. Ry. Co.*, 63 App. Div. (N. Y.) 332, 71 N. Y. Supp. 554; *Bennett v. Third Ave. R. Co.*, 40 App. Div. (N. Y.) 626, 57 N. Y. Supp. 994; *Skelton v. St. Paul City Ry. Co.*, 88 Minn. 192, 92 N. W. 960; *Cooper v. Georgia, etc., Ry. Co.*, 61 S. C. 345, 39 S. E. 543.

5. Passenger alighting while car is in motion. a. In general.—A passenger alighting from a car while it is in motion is not guilty of contributory negligence as a matter of law. Whether or not it be negligence for him to alight or to attempt to alight under such circumstances will depend upon the peculiar circumstances of the case. As stated by Mr. Nellis in his work on *Street Railroad Accident Law*, p. 209: "The facts in each particular case must determine the question of negligence. If conditions exist arising from the negligence of the carrier, where great danger is apparent if the passenger remains on the car, or where he is told by the person in charge of the car to jump off, or where there are other peculiar circumstances which justify him in doing so, it would not be negligence for a passenger to alight from a car while the car was moving." See *Campbell v. Los Angeles R. Co.*, 135 Cal. 137, 67 Pac. 50.

The determination of the question as to whether alighting from a moving street car constitutes negligence is for the jury. *Omaha St. Ry. Co. v. Craig*, 39 Nebr. 601, 58 N. W. 209; *Dickson v. Broadway, etc., R. Co.*, 41 How. Pr. (N. Y.) 151. But the conditions under which the accident occurred may be such as to render the act of the passenger in alighting from a moving car negligence *per se*. Thus where the car is at the time moving at a rapid rate, making an attempt to alight evidently dangerous, the plaintiff has been held guilty of negligence as a matter of law. *Jagger v. People's St. R. Co.*, 180 Pa. St. 436, 36 Atl. 867. And where a person gets off a street car while it is in motion without notifying the conductor of his intention, his negligence will preclude recovery. *White v. West End St. R. Co.*, 165 Mass. 522, 43 N. E. 298. And a passenger who unnecessarily steps from a street car in motion, with his hands laden with packages, when danger and injury

perverse. This motion was denied. Judgment was awarded plaintiff amount of the damages found by the jury and for costs. This from that judgment.

Woodward & Lees, for appellant.

Morris & Hartwell, for respondent.

Opinion by *SIEBECKER, J.*

The first exception urged is that the court erred in the case to the jury upon the evidence. It is contended

would have been avoided if he had remained on the car, he is a matter of law. *Ricketts v. Birmingham St. Ry. Co.*, 85 Ala. 6. And if the evidence shows that the conductor signaled the car to the plaintiff's request, and the plaintiff jumped from the car began to slacken, it is error to refuse to instruct the jury that he is entitled to a verdict. *Harmon v. Washington & G. R. Co.* (D. C.), 57.

It is gross negligence for a passenger to jump from a car traveling at a rate of twenty miles an hour, and his liability for such negligence is not affected by the fact that he was told in the presence of the conductor or third person that the car was not going to stop, and that he should jump off; nor will such liability be affected by the fact that the car was in excess of that authorized by a city ordinance. *Masterson v. City of Atlanta*, 88 Ga. 436, 14 S. E. 591.

b. Taking position on steps preparatory to alighting.—A passenger on a street railway car is not necessarily negligent in taking, with a position on the steps or platform of the car preparatory to alighting, in attempting to alight while the car is moving so slowly that it appears to be dangerous to a man of ordinary prudence. *Birmingham & Elec. Co. v. James*, 121 Ala. 120, 25 So. 847; *Watkins v. Birmingham & Elec. Co.*, 120 Ala. 147, 24 So. 392, 43 L. R. A. 297; *North v. R. Co. v. Wiswell*, 168 Ill. 613, 48 N. E. 407; *Bowie v. Greenville*, 69 Miss. 196, 10 So. 574; *Sweeney v. Kansas City Cable Co.*, 51 S. W. 682. There is no rule of law which requires a passenger on a car to retain his seat or other position until the car has stopped, and it is a matter of universal observation that thousands of passengers get off their seats to get off before the car has stopped, without injury. *Babcock v. Los Angeles Tract. Co.*, 128 Cal. 173, 60 Pac. 101; *St. Paul City Ry. Co.*, 54 Minn. 379, 56 N. W. 42; *Nichols v. R. Co.*, 38 N. Y. 131, 97 Am. Dec. 780; *Demann v. Eighth Ave. Ry. Co.*, 191, 30 N. Y. Supp. 926.

In the case of *Philips v. St. Charles St. Ry. Co.*, 106 La. 135, the plaintiff, a passenger on one of the defendant's street cars, fell upon the step of a car as it was about to stop and lost his balance. He alleged that the cause of the fall was the sudden jerking of

plaintiff arose from her seat and got off the car while it was in motion, and that the evidence leaves no room for conflicting inferences upon this question. This claim is based upon the assumption that plaintiff's testimony and that of her mother, tending to show that she had nearly gotten off the car while it stopped, is against the reasonable probabilities and the overwhelming preponderance of the evidence.

From the testimony of plaintiff and her mother it appeared that plaintiff gave notice to the conductor that she wished to get

the evidence showed that such jerking was not greater than was usual in the stopping of street cars; there were no discoverable defects in the step; it was held that he could not recover for the injuries. And in the case of *Baltimore Consol. Ry. Co. v. Foreman*, 94 Md. 226, 51 Atl. 83, it appeared that notices were posted in the defendant's cars to the effect that cars stopped near intersecting streets and passengers must not leave their seats until the car stopped, nor stand on the platform, nor leave the car while in motion; the plaintiff went upon the platform and stood upon the lower step to jump off, after he had asked the conductor to let him off at the next corner; while standing there the conductor signaled to go ahead, and the plaintiff was thrown into the street. It was held that he was guilty of contributory negligence.

c. **Effect of failure of employee to stop car.**—The mere fact that the person in charge of a car failed or refused to stop the car at a place where the passenger desired to get off would not relieve such passenger from his contributory negligence in alighting from the car while it was in motion. *Outen v. North & South St. R. Co.*, 94 Ga. 662, 21 S. E. 710; *Dresslar v. Citizens' St. R. Co.*, 19 Ind. App. 283, 47 N. E. 651; *Cram v. Metropolitan R. Co.*, 112 Mass. 38; *Solomon v. Central Park, etc., R. Co.*, 31 N. Y. Super. Ct. 298. But where the conduct of the persons operating the car is such as to induce the passenger to believe that the speed of the car is lessened so as to enable the passenger to alight, and that there is no danger in so doing, the question of negligence, both on the part of the passenger and of the company, is for the jury. *Crissey v. Hestonville, etc., Ry. Co.*, 75 Pa. St. 83. Where a child is directed to jump off a car by the conductor, who refuses on request to stop, the question of his contributory negligence under the circumstances is for the jury. *Lovett v. Salem & S. D. R. Co.*, 9 Allen (Mass.), 557; *Wyatt v. Citizens' Ry. Co.*, 55 Mo. 485.

In this connection it is said by Judge McClain in his article on "Carriers," 6 Cyc. 649: "In general with reference to either steam or street cars it may be said that the fact that the train or car is not stopped at the proper place, or not stopped long enough to enable the passenger to alight, will be no excuse for his incurring danger in attempting to get off; while on the other hand, if the speed has been checked so as to indicate an intention that he shall alight, or so as to render it not hazardous to do so, the act of

off the car at the Partridge drug-store crossing, the crossing of Gillett street; that the car stopped; that her seat, followed two passengers out of the door and was in the act of alighting from the last started, and that this caused her to fall onto a few feet of this crossing. This evidence is clothed by the two conductors, a motorman, and four others observed the accident. The finding of the jury at the trial court in passing upon the motion for a new trial on the evidence in itself is not so inherently improbable.

alighting before the train or car has come to a full stop be negligent."

d. Effect of ordinance to stop at street crossing.—Where a city ordinance prohibits a car from stopping on the east side of a street for a passenger to attempt to get off at such a crossing, and the employees of the company did anything to induce the passenger to make such attempt. *Calderwood v. No. Birmingham St. Ry. Co.*, 66 So. 66.

6. Safe place for alighting.—It is the duty of the street railway company to stop the car at a place where it is safe for passengers to alight. If the place where the car stops is in an unsafe condition, the company should be warned of the existing dangers. See *Leverette v. St. Louis Transit Co.*, 1 St. Ry. Rep. 253, and note on p. 255. See *St. Louis Transit Co. v. Morvilius*, 2 St. Ry. Rep. 548, (Mo.) 77 S. W. 2d 221, (Ind.) 221. *Cotant v. Boone Sub. Ry. Co.*, 2 St. Ry. Rep. 269, (Iowa) 137.

A street railway company is bound to afford its passengers a safe place to alight, and it has the right to select such place. *V. Co. v. Buckley*, 102 Ill. App. 314, affirmed, 200 Ill. 260, 102 Ill. 260. *Concord St. Ry. (N. H.)*, 46 Atl. 1056. But the company is negligent in carrying a passenger past his destination to a dangerous place. *Henry v. Grant St. Elec. R. Co.*, 24 Ky. 137. If, to improve the roadbed, a street railway company leaves open trenches in a public street, it owes the duty to alight from street cars, as well as to others of the street, to exercise reasonable care to guard the trench and give notice of the danger. *Wolf v. Third Ave. R. Co.*, 67 App. Div. (N. Y.) 336. While a street railway company is not bound to furnish a safe place for depositing its passengers, yet it is bound to condition of the street at the place of discharging a passenger, or is such as must be known to the company, and is negligent in failing to warn him of the danger or to assist him in safely alighting. *Louisville Ry. Co.*, 23 Ky. L. Rep. 2279, 67 S. W. 4.

overcome by the testimony of the other witnesses and the facts and circumstances of the case, as to justify this court in concluding that it furnishes no support for the verdict. The testimony of plaintiff and her mother, if credible, furnishes a sufficient and legal basis for the company's liability. It is not impeached except by the testimony of the other witnesses. The situation thus presented is one peculiarly depending upon the weight of the evidence and the credibility of the witnesses. We cannot say that the trial court erred in refusing to set aside this verdict as against the evidence in the case. The case bears a close analogy to and comes within the ruling of *Hardy v. Street Ry. Co.*, 59 Wis. 183, 61 N. W. 771, and subsequent cases approving the ruling in the Hardy case.

The court gave the jury the following instruction: "But if you believe that a reasonable stop was made—that is, a stop for a reasonable length of time—at or near Gillett street, and that she had given no notice or signal that she desired to get off at this place, and shall further believe that afterward, after it started, it occurred to her that she ought to have gotten off at this place at Gillett street or where it stopped, and shall believe that she attempted to go out of the car while it was in motion and after it had started again, and shall believe that by reason of its being in motion was the cause of her falling off, then she cannot recover in the action." It is urged that this is misleading, in that the instruction includes elements wholly immaterial, and not necessary to be passed upon by the jury to acquit defendant of liability. The court had given instructions upon this branch of the case in very positive and unqualified terms, stating that, if respondent undertook to leave the car after it had started and was in actual motion, she could not recover in the action. Different parts of the charge state the rule unqualifiedly that, if a passenger undertakes to alight from a car while in motion and is injured in getting off the car, he has no claim against the street car company for any damages so sustained. Taking these parts of the charge in connection with the part excepted to, we do not think the jury could have been misled in applying the proper rule to the facts found by them.

The judgment of the Circuit Court is affirmed.

Nassau Electric Railway Co. v. Corliss.

(United States — Circuit Court of Appeals, Second Circuit.)

INJURY TO PASSENGER ATTEMPTING TO BOARD CAR; EVIDENCE AS TO RULE REQUIRING CAR TO STOP.—The plaintiff was a passenger upon one of the defendant's cars and was injured while attempting to board it by being thrown by the sudden start of the car. The defendant claimed that the plaintiff attempted to board the car while it was in motion. The plaintiff's right to recover depended solely upon his ability to establish the proposition that the car was at rest when he attempted to board it. The rule of the company adopted prior to the accident, requiring all cars to stop at the point where the accident occurred, is, therefore, properly admissible in evidence.

WRIT OF ERROR by defendant below to review judgment in favor of plaintiff.
Decided November 18, 1903. Reported 126 Fed. 355.

I. R. Oeland, for plaintiff in error.

James A. Burr, for defendant in error.

Opinion by COXE, Cir. J.

The defendant in error, who was the plaintiff below, was injured by being thrown violently against an iron pillar of the elevated railway structure on Fulton street, Brooklyn, N. Y., while he was attempting to board one of the surface cars operated by the plaintiff in error, who was the defendant below.

At the trial the plaintiff testified that when he stepped upon the running-board of the car it was standing still, and when in the act of getting on, with one foot on the running-board and the other in the car, it was moved suddenly forward so that he came into violent contact with the pillar and received the injuries of which he complains. The defendant disputed this theory of the accident and its witnesses testified that the plaintiff attempted to board the car while it was in motion. The trial judge instructed the jury that if the defendant's version of the accident were correct the plaintiff was guilty of contributory negligence and could not recover.

So far as the defendant's negligence is concerned the only ques-

tion at the trial was whether the car was moving or standing still at the time the plaintiff attempted to board it. The only question debated upon this appeal is whether or not the court erred in permitting testimony to show that at and prior to the day of the accident the defendant had adopted a rule requiring all cars to stop at this point and that they did in fact so stop. It seems to us that there was no error in admitting this testimony. The plaintiff's right to recover depended solely upon his ability to establish the proposition that the car was at rest when he attempted to board it. The fact that the place was a designated stopping point for all the defendant's cars, and that they all stopped there, was strongly corroborative of the plaintiff's testimony that the car was not moving.

Assume, for the purposes of illustration, that the accident had occurred on a steam road; at Tarrytown, for instance, on the Hudson River railroad. Can there be a doubt that, in answer to defendant's testimony that the train ran through the station at Tarrytown without stopping, the plaintiff would be permitted to show that Tarrytown was one of the scheduled stations for that train and that it always stopped there? We think not.

The plaintiff was not attempting to prove negligence in stopping or not stopping the car, but simply the existence of a rule and custom which required that the car should stop at that point, and that, in accordance with this rule and custom, all the cars of that line did stop.

In this respect the case differs from the authorities cited by the defendant in support of its contention. For instance, in *Warner v. N. Y. Cent. R. Co.*, 44 N. Y. 465, the plaintiff had offered testimony that the flagman, at the crossing where the accident happened, was intoxicated at the time, and also testimony that he was seen in an intoxicated condition on many previous occasions. The admission of testimony relating to his condition prior to the accident was properly held to be error. That cause would have been analogous to this if the flagman's presence or absence had been the point in issue and testimony had been adduced to show that there had always been a flagman stationed there and that the rules of the company so required.

As was said by the Supreme Court in the case of *Dunlop v. The United States*, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799.

"Business could hardly be carried on without indulging in the presumption that employees, who have certain duties to perform and who are known generally to perform such duties, will actually perform them in connection with a particular case."

The only other assignment of error argued relates to a question asked of the physician of the plaintiff as to the permanence of his injuries. This question was as follows:

"Q. Can you state whether from your examination in 1899, taking that first, you think he will ever regain full use of that arm, so far as the motion of the arm at the shoulder joint is concerned?"

The question was objected to as "incompetent, immaterial, and improper, in that the plaintiff has already stated that since 1899 there has been improvement in this particular joint." The objection was tantamount to saying that the question was incompetent, immaterial, and improper because the plaintiff had stated that there had been improvement in the shoulder joint since 1899. If the objection had been that the question was improper in form for the reason that it did not confine the answer within the limits of "reasonable certainty" it would have fairly presented the contention now advanced. This it did not do and was properly overruled.

The judgment is affirmed, with costs.

INDEX TO CASES.

(For Index to Notes, see *ante*, p. xv.)

ABUTTING OWNERS. (See *Consent of Abutting Owners; Additional Servitude.*)

CROSS-OVER SWITCHES.—Abutting owner cannot compel removal of cross-over switch on ground of annoyance and nuisance, merely because company has failed to comply in detail with requirements of franchise as to construction of its road. *State ex rel. Howard v. Hartford St. Ry. Co.* (and note), 48.

DEPRECIATION OF VALUE OF PROPERTY.—Abutting owners are entitled to compensation for depreciation of value of property by a use of streets for street railway purposes. *South Bound R. Co. v. Burton*, 867.

MEASURE OF DAMAGES.—Abutting owners are only entitled to damages for the substantial depreciation of the value of their abutting lots. The measure of the assessment is the decline in the value of the property consequent upon the use of the street by the railroad. *South Bound R. Co. v. Burton*, 867.

Where interurban railways are constructed in highways, see *Younkin v. Milwaukee L., H. & Tract. Co.*, 973.

Where street is used for subway, see *Sears v. Crooker*, 444.

Right of street railway company to condemn fee in street, see *Schenectady Ry. Co. v. Peck*, 806.

Rights of abutting owners where occupation of highway by street railway is unauthorized, see *Henning v. Hudson Valley Ry. Co.*, 806.

Right of lessee of adjoining premises to recover damages against elevated railroad company, see *Child v. New York Elev. R. Co.*, 806.

Rights of abutting owners to maintain ejectment against steam railroad company unlawfully occupying street, see *Bork v. United N. J. R. & C. Co.* (and note), 727.

Restraint of use of street by street railway without consent, see *Paige v. Schenectady Ry. Co.*, 768.

ADDITIONAL SERVITUDE.

ELECTRIC RAILWAY NOT AN ADDITIONAL SERVITUDE.—An electric street railway, operating within the limits of a city for the purpose of carrying passengers, is nothing more than an improved method of using a street to effect its original design, and is not an additional burden on the fee of the street. *Younkin v. Milwaukee L., H. & Tract. Co.*, 973.

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ADDITIONAL SERVITUDE — (Continued).

INTERURBAN RAILWAYS IN HIGHWAYS.—A street railroad upon a public highway between cities is an additional burden which entitles the abutting owners to compensation. *Younkin v. Milwaukee L., H. & Tract. Co.*, 973.

INTERURBAN RAILWAYS PASSING THROUGH STREETS OF CITY.—An interurban railway constructed from one city through the streets of another to a terminal point beyond such city is an additional burden upon the street in the city through which it runs, and the abutting owners are entitled to compensation. The abutting owners are entitled to relief by injunction restraining the operation of a street railway in such a street. *Younkin v. Milwaukee L., H. & Tract. Co.*, 973.

Street railway does not constitute an additional burden upon the street, see *Anderson v. Columbus*, 817.

Where street is used for subway, see *Sears v. Crocker*, 444.

ADVERTISING IN STREET CARS.

Who liable for payment of privilege tax, see *Knowville Tract. Co. v. McMillan*, 879.

AMUSEMENT PARK.

DUTY OF STREET RAILWAY COMPANY TO PROTECT PERSONS IN AMUSEMENT PARK MAINTAINED BY IT.—The plaintiff, a colored person, was transported over the street railway of the defendant company to an amusement park maintained and supported by it. Such park had been frequently visited by a large number of lawless persons who were hostile to colored people. The defendant had knowledge of this, but did not inform the plaintiff of such fact. While in such park the plaintiff was assaulted and severely injured by such lawless persons. The defendant's employees did nothing to protect the plaintiff. A judgment in favor of the plaintiff was sustained. *Indianapolis St. Ry. Co. v. Dawson*, 245.

ANIMALS. (See Fright of Horse.)

COLLISION; LIABILITY FOR INJURY.—It is the duty of a motorman operating an electric car to keep a lookout for live stock, and not to run his car at such a rate of speed that he could not stop it within the distance required to prevent collision; but if an animal come suddenly on the track so close to the car that the motorman cannot stop in time to prevent running over it, he is not guilty of negligence. *Anniston Elec. & G. Co. v. Hewitt* (and note), 14.

APPEALS.

QUESTIONS FOR REVIEW.—Questions not presented to the trial court by the motion for a new trial, and which are not mentioned in the petition in error, cannot be considered on appeal. *Lincoln Traction Co. v. Moore* (and note), 642.

APPLIANCES. (See Employees; Fenders; Passenger.)

Alleged defective device for shutting and opening door of car, see *Williams v. Citizens' Elec. St. Ry. Co.*, 433.

ARREST.

ILLEGAL ARREST BY STREET CAR CONDUCTOR.—A street railway company is not liable for the arrest and imprisonment of a person by a conductor acting as a special police officer under authority of statute, unless he was directed to make the arrest by the company, or was engaged in its business, and acting within the scope of his authority. *Cordner v. Boston & Maine R. Co.*, 684.

ARREST OF PASSENGER.

Liability for unlawful arrest of passenger, see *Farrell v. St. Louis Trans. Co.* (and note), 592.

ASSAULT UPON PASSENGER.

JUSTIFICATION OF ASSAULT.—Abusive language or opprobrious epithets used by a passenger do not justify the commission of an assault upon him by a conductor. In ejecting a passenger the conductor has no right to strike him unless in self-defense, and it is for the jury to determine from all the facts if the assault was proper in an effort to eject. *Birmingham Ry., L. & P. Co. v. Mullen* (and note), 5.

Aggravating conduct of passenger may be considered in determining compensatory damages, see *Freedman v. Metropolitan St. Ry. Co.*, 802.

Of passenger by conductor, see *Sonnem v. St. Louis Transit Co.*, 632.

ATTORNEY'S LIEN.

ENFORCEMENT OF SUIT.—While attorneys-at-law have the same right and power over suits brought in behalf of their clients to enforce their lien for fees as their clients have, and such suits may be prosecuted for the benefit of the attorney having a lien notwithstanding a settlement between the parties to the suit, made without the knowledge or consent of the attorney, still there can be no recovery in behalf of the attorney, unless the evidence is of such a character as would have authorized a recovery by the client if the suit were still proceeding for his benefit. *Atlanta Ry. & P. Co. v. Owens*, 78.

BICYCLIST.

CONTRIBUTORY NEGLIGENCE.—Bicyclists killed by street car while competing in a race in public streets held guilty of contributory negligence. *Harrington v. Los Angeles Ry. Co.* (and note), 22.

LAST CLEAR CHANCE.—Rule applied and company held liable on ground that motorman could have stopped car in time to avoid accident. *Harrington v. Los Angeles Ry. Co.* (and note), 22.

KNOWLEDGE OF DANGEROUS SITUATION.—The failure to stop the car was negligence, under the rule that one having knowledge of the dangerous situation of another, and having a clear opportunity by the exercise of proper care to avoid injuring him, must do so, notwithstanding the latter placed himself in such situation of danger by his own negligence. *Harrington v. Los Angeles Ry. Co.* (and note), 22.

BICYCLIST — (*Continued*).

Riding along track without looking behind, see *Baldwin v. Heraty*, 503.

Injured by electric shock received by contact with stay wire from trolley pole, see *Walters v. Syracuse Rap. Transit Co.* (and note), 758.

Attempting to cross track immediately in front of street car, see *Schroeder v. Metropolitan St. Ry. Co.*, 785.

BRAKES. (See *Passenger*.)

Municipal ordinance requiring air or electric brakes, see *People v. Detroit United Ry. Co.* (and note), 460.

CAR WINDOWS.

BREAKING CAR WINDOWS.—The willful breaking of the window of a street car in use upon a street railway is not a violation of any of the provisions of section 2098, Kans. Gen. Stat. 1901. *State v. Cain*, 291.

CHILDREN. (See *Collisions Generally*; *Imputed Negligence*; *Passenger*.)

DEGREE OF CARE TO AVOID INJURY TO CHILDREN.—The vigilance and activity obligatory upon a street railway company's servants to avoid injury to children are the same in degree as rest on them generally to avoid harm to persons in city streets; that is, ordinary vigilance and activity, not extraordinary. While less care for their own safety is exacted of young children than of individuals of full capacity, the general rule for measuring the care to be observed by others in such instances is not raised in favor of children. If a motorman knows a street crossing will be thronged with school children at a certain hour of the day, that fact should warn him of the danger of an accident, if he moves over the crossing at that hour without having his car under control; and if a child is injured by his running over the crossing at a high speed at the given hour, a question of fact arises as to whether he was negligent. *Kude v. St. Louis Transit Co.* (and note), 597.

DUTY TO AVOID INJURY.—It was the duty of the motorman as his car approached the crossing to observe children near the track in such an attitude as to suggest a probability of their placing themselves in the way of the car, and to use all reasonable care to avoid injuring them in the event of that probability changing to a certainty. *Forrestal v. Milwaukee Elec. Ry. & L. Co.*, 968.

ORDINARY CARE IN AVOIDING COLLISION.—Although a child may be deemed a trespasser on a street railway track, it is nevertheless the duty of the motorman to exercise ordinary care to prevent injuring him after his presence on the track is, or should have been, discovered. It is for the jury to determine in view of all the evidence as to whether such ordinary care was exercised. *Carney v. Concord St. Ry. Co.* (and note), 668.

DEATH OF CHILD CAUSED BY COLLISION; NEGLIGENCE IN FAILING TO STOP CAR.—The plaintiff's child, four years of age, was killed while attempt-

CHILDREN — (Continued).

ing to cross the tracks of the defendant by being cars. The negligence charged was the failure of to stop the car after he noticed the perilous position was placed. The evidence was considered and held the submission of the question to the jury. *Me Ry. Co.*, 536.

PERILOUS POSITION OF CHILD ON TRACK.—An issue to the effect that the law did not require the employees to stop the car until they saw, or might have exercised reasonable care, that the child was in a position to be placed in such a position, and that if the employees as the child was in such position or was absent the employees used reasonable care to prevent the child but were unable to do so, then the plaintiffs prevailed. The principle was applied that the servants of a company are required to stop a car when they exercise of reasonable care, that a child is in a position on the track, or is about to be placed in such position. *Metropolitan St. Ry. Co.*, 536.

INJURY TO CHILDREN WALKING ON TRACK; CONDUCT DUTY OF MOTORMAN TO STOP.—Where a motorman drove a car upon the track for a distance of more than 100 feet without exercising ordinary care could have avoided the injury to the child, it was held that notwithstanding the duty of the motorman to stop and the right of the motorman to presume in the absence of evidence that the child would look for the car and get out of the way, the motorman to use ordinary care to prevent the injury the company is liable. *Jett v. Central Elec. Ry.*

COLLISION WITH CHILD ON TRACK; CONTRIBUTORY NEGLIGENCE OF CHILD.—A child of less than two years of age was struck by a car and killed, it was held that the child being incapable of exercising care for its safety, and the negligence not being imputable to him, there is no question of contributory negligence in the case. *Carney v. Concord St. Ry. Co.*

ALLOWED TO PLAY ON STREET.—The question as to whether a child, injured by a collision with one of the defendant's cars, was due care in letting such child play in an inclosed street where the child was under the charge of her older sister and went upon the street where the accident occurred. *Mellen v. Old Colony St. Ry. Co.*, 427.

NEGLIGENCE OF CHILD IN GOING UPON TRACK IN FRONT OF CAR.—The negligence of a child in going upon track in front of a car was held not to constitute contributory negligence. *McDonald v. Metropolitan St. Ry. Co.*, 788.

INJURY TO CHILD FALLING WHILE CROSSING TRACK.—The negligence of the defendant in not stopping the car when the child was on the tracks of the defendant was held not necessary to constitute negligence. *Metropolitan St. Ry. Co.*, 788.

CHILDREN — (Continued).

of the accident. If the defendant was negligent in not using due care to avoid the accident, it will be liable for the resulting injury if the injured party himself was not guilty of negligence contributing to the accident. *Kube v. St. Louis Transit Co.*, 597.

Fall of child while attempting to cross track; effort of motorman to avoid collision, see *Sciurba v. Metropolitan St. Ry. Co.*, 789.

Injured by collision with car not provided with fender, see *Fritsch v. New York & Queens County Ry. Co.*, 789.

Collision with freight car on street railway; degree of care, see *Daly v. Milwaukee Elect. Ry. & L. Co.*, 459.

EXTRICATING CHILD FROM BENEATH CAR AFTER COLLISION.—It is proper to submit to the jury the question as to whether a conductor exercised ordinary care and did that which a person of average prudence would have done under like circumstances in a like emergency, in adopting means to extricate a child from underneath a car after a collision. *Carney v. Concord St. Ry. Co.* (and note), 668.

INJURY TO CHILD RIDING ON STREET CAR STEP; DUTY AS TO TRESPASSER.—

The plaintiff, a child between the ages of six and seven years, was riding upon the step of the rear platform of one of the defendant's cars outside of a rail erected on one side of the platform to prevent ingress and egress to and from the car upon that side. He was thrown off by the jolting of the car and injured. It was held that, notwithstanding the fact that the child was of such an age as not to be guilty of contributory negligence, he was a trespasser to whom those in charge of the car did not owe the duty of discovering his peril. *Monehan v. South Cov. & Cin. St. Ry. Co.* (and note), 312.

EVIDENCE AS TO CUSTOM OF CHILDREN TO RIDE ON STEPS OF CAR.—It is proper to exclude testimony that in a thickly settled portion of the city many children congregated thereabouts and had theretofore often trespassed upon the defendant's cars with the knowledge of the employees in charge thereof. *Monehan v. South Cov. & Cin. St. Ry. Co.* (and note), 312.

RIDING ON CAR WITHOUT PERMISSION; WANTON INJURY.—A street railway company is liable for injury to a child, six and one-half years old, who was riding on the lower step of the front platform of a car, caused by wanton negligence of motorman. *Aiken v. Holyoke St. Ry. Co.* (and note), 416.

AS PASSENGER PERMITTED TO RIDE ON PLATFORM; CONTRIBUTORY NEGLIGENCE.—A child of seven years of age permitted to stand upon the edge of a platform, preparatory to alighting, cannot be held responsible for his negligence. The question, under the evidence, of his contributory negligence is for the jury. *Parker v. Washington Elec. St. Ry. Co.*, 857.

COLLISIONS GENERALLY. (See *Children; Pedestrian*.)

DUTIES OF STREET RAILWAY COMPANY AS TO PERSONS

street railway company knows or has reason to believe likely to be on their tracks at a particular point, its duties to such persons: 1. To keep a lookout in advance; 2. To avoid injury when it sees such persons in peril through the exercise of ordinary care. A failure in the performance of these duties imposes a liability upon the company for the injury. *Richmond Pass. & P. Co. v. Gordon*, 936.

With railroad train at crossing of steam railroad and street car. *Philip v. Heraty*, 481.

CONCURRENT NEGLIGENCE. (See *Children; Passengers; Vehicles, Collision.*)

IMPOSSIBILITY TO SEPARATE PARTIES' CONDUCT.—Where a pedestrian injured in collision and the negligence of the company is concurrently concurrent that it is impossible to separate the negligence of the company from that of the pedestrian, the negligence of the pedestrian is not a defense. *Richmond Traction Co. v. Martin's Adm'rs* (and note).

PROXIMATE CAUSE.—If the proximate cause of the injury is the recent negligence of the plaintiff and defendant, the negligence of the plaintiff precludes his recovery. *Richmond Pass. & P. Co. v. Gordon*, 936.

CONDUCTOR. (See *Assault upon Passenger; Employees*.)

Injured while standing on running-board by pole of street car; liability of employer of driver of wagon, see *Richmond v. Benedict* (and note), 120.

Injured by being struck by following car, while attempting to alight. *Simmons v. Southern Traction Co.*, 861.

CONSENTS OF ABUTTING OWNERS. (See *Abutting Owners*.)

WITHDRAWAL OF CONSENTS.—The provisions of a statute authorizing the construction of a street railway, which refers only to a particular application for permission to construct a railroad, and if an application to a municipal body has been denied, the consents, if withdrawn before the construction is enforceable. *Paterson & S. L. Traction Co. v. West*, 768.

EFFECT; WITHDRAWAL; ABANDONMENT OF ROAD.—Consent to the construction of a street railway after road is constructed. The abandonment of the road does not affect the rights acquired under the consents. Survive the reorganization of the company and pass to the successor. *Schenectady Ry. Co.*, 768.

CONSTITUTIONALITY.

As to taxation of street railways, see *San Francisco & S. M. Elec. Ry. Co. v. Scott* (and note), 36.

CONTRIBUTORY NEGLIGENCE. (See *Bicyclists; Children; Fright of Horse; Passenger; Pedestrians; Vehicles, Collision.*)

CONTROL OF CAR. (See *Motorman; Speed; Street Intersections.*)

Duty as to control of car at street intersection, see *Searles v. Elizabeth, P. & C. J. Ry. Co.* (and note), 706; *Mauer v. Brooklyn Hts. R. Co.*, 787.

CROSSING RAILROAD BY STREET RAILROAD.

CONSTRUCTION OF CROSSING; DECREE OF RAILROAD COMMISSIONERS.—Under Maine statutes the whole question of how railroad crossings shall be constructed and maintained is left, in the first instance, to the sound judgment and discretion of the railroad commissioners for determination; and their decision, when made, is final, unless an appeal is taken. *Boston & M. R. Co. v. Saco Valley Elec. R. Co.*, 376.

MODIFICATION OF DECREE.—They have no authority to modify or change such a decree once made, except upon a new application, notice, and hearing; nor can they, before appeal, make a temporary decree which does not purport to represent their sound judgment and discretion in the premises. Such temporary decree is void. *Boston & M. R. Co. v. Saco Valley Elec. R. Co.*, 376.

JURISDICTION OF COURT OF CHANCERY.—Courts of chancery have jurisdiction to determine how conflicting easements of way across the same place shall be occupied and used by two or more holders of such easements. Such jurisdiction is one of the inherent equitable powers of such court and is exclusive. It is unaffected by any legislative franchise granted to a corporation, or by a legislative charter empowering a municipality to regulate the streets and railroad crossings within its bounds. *West Jersey & S. R. Co. v. Atlantic City & S. T. Co.*, 717.

COST OF CONSTRUCTION.—Where a newly organized company is authorized to lay its railroad tracks at grade across the existing tracks of another railroad, and the construction proposed involves only such a crossing, the new company should pay the expenses incident to the safe construction of its tracks across those of the former company. *West Jersey & S. R. Co. v. Atlantic City & S. T. Co.*, 717.

Construction of statute requiring railroads to cross otherwise than at grade, see *Baltimore & O. Ry. Co. v. Butler Pass. Ry. Co.*, 847.

Statute requiring street car to come to a full stop before crossing steam railroad, see *Kopp v. Baltimore & O. S. W. Ry. Co.*, 818.

DANGEROUS CROSSING. (See *Employees; Motorman; Pedestrian; Vehicles, Collision.*)

Extra precautions required, see *Eichorn v. New Orleans & C. R. L. & P. Co.* (and note), 351.

DERAILMENT. (See *Passengers; Presumption of Negligence*;
Causing injury to passenger, see *Smith v. Milcauk*
(and note), 962.

DIRECTORS.

CRIMINAL LIABILITY FOR INJURIES TO PASSENGERS.
of street railway companies are not criminally liable for injuries to passengers unless they have been guilty of gross negligence in the performance of, or in the failure to perform, some duty rendered necessary in the performance of their duty to be such gross negligence to omit to provide a safe crossing at a steam railroad crossing. *State v. Young*, 688.

PERMITTING CROWDED FRONT PLATFORM.—It is not negligent for directors to permit front platforms of street cars to be crowded with children and other passengers. *State v. Young*, 688.

CONSIDERATION OF ENTIRE SYSTEM OF OPERATION.
Where the entire system of construction and operation was sufficiently safe to justify directors and officers in not taking additional precautions were unnecessary they cannot be held liable for such gross negligence. *State v. Young*, 688.

FAILURE OF EMPLOYEES TO OBSERVE RULES.—If it appears that a failure would not have occurred if the rules and regulations of the company's directors and officers had been observed and followed by the employees in charge of the car, such directors and officers cannot be held liable for the failure of such employees to perform their duty. *Young*, 688.

CRIMINAL LIABILITY.—When directors and officers of a street railway company are criminally liable for death of passenger, see

EJECTION OF PASSENGER. (See *Assault upon Passenger; Passenger*.)

EVIDENCE.—Statements of persons witnessing affair are not admissible. *Foster v. Atlanta Rapid Transit Co.*
Liability for unnecessary force, see *Birmingham Ry., & N. O. Co.*, 5.

For failure to pay fare; force to be used by conductors, see *Louis Transit Co.*, 632.

For failure to produce transfer, see *Crowley v. Filley*, 453.

EJECTION. (See *Abutting Owners*.)

Abutting owners may maintain ejection against party unlawfully occupying street, see *Bork v. Union*
(and note), 727.

ELECTRICITY.

DEATH CAUSED BY DEFECTIVE INSULATION.—Street railway company held liable for death of employee of telephone company caused by shock from defectively insulated hanger by which trolley wire and the span wire were connected. *Whitworth v. Shreveport Belt Ry. Co.* (and note), 362. Bicyclist injured by electric shock received by contact with stay wire from trolley pole, see *Walters v. Syracuse Rap. Transit Co.* (and note), 758.

ELEVATED RAILROAD.

Right of lessee of adjoining premises to recover damages, see *Child v. New York Elev. R. Co.*, 806.

EMINENT DOMAIN. (See *Abutting Owners.*)

RIGHT TO EXERCISE POWER.—The right of a traction company to exercise the power of eminent domain is a question to be determined in the condemnation proceedings; a party aggrieved by an erroneous ruling as to such right is not entitled to an injunction, but his remedy is by appeal. *Boyd v. Logansport, R. & N. T. Co.* (and note), 193.

Right of street railway to condemn fee of abutting owners in street, see *Schenectady Ry. Co. v. Peck*, 806.

ASSESSMENT OF DAMAGES.—Where an electric railway company seeks to acquire by condemnation a right of way across farm lands, the owner is entitled to an assessment of such damages as are occasioned to the entire farm by the taking of the right of way. The fact that the company in describing the lands over which it desires to construct its road includes only a portion of the farm does not affect this right. Nor does the fact that a steam railroad is built from east to west across the farm, where the land on both sides of such railroad is used for farm purposes, affect the owner's right to have the entire tract treated as one farm. *Cook v. Boone Sub. Elect. Ry. Co.*, 258.

MEASURE OF DAMAGES.—Where land is acquired by a street railroad company by condemnation, the owner is entitled to recover the market value of the premises actually taken, and also any damages resulting to the residue, including those which will be sustained by reason of the use to which the portion taken is to be put. *South Buffalo Ry. Co. v. Kirkover*, 733.

EMPLOYEES. (See *Conductor; Motorman.*)

WORKMAN ON TRACK FELLOW SERVANT OF MOTORMAN.—A laborer engaged in the construction of street railway tracks, while seated in a work car of the defendant preparatory to being carried to his home, was injured by one of the defendant's passenger cars colliding with such work car. It was held that such laborer was a fellow servant of the motorman and other employees having charge of the passenger car which collided with the work car in which he was seated. *Indianapolis & G. R. T. Co. v. Foreman* (and note), 206.

EMPLOYEES — (Continued).

CONDUCTOR OF ONE CAR AS FELLOW SERVANT OF A CAR.—Where a conductor on one car and a gripman the same general service, and the same general line the duties of such employees were such as to bring association, with power and opportunity to influence and caution, they are as a matter of law fellow servants. *Ry. Co. v. Leach* (and note), 156.

RELATION OF FELLOW SERVANTS; WHEN QUESTION IS court is to determine as a matter of law the facts relation of fellow servants; but the question as to exist is a question of fact for the jury. *Chicago* (and note), 156.

Injury to car repairer by start of trolley car which *Quinn v. Brooklyn Hts. R. Co.*, 803.

A conductor assumes the risk from the known incompetency see *White v. Lewiston & Y. F. Ry. Co.*, 805.

Street railway not within provisions of Missouri Fe see *Johnson v. Metropolitan Street Ry. Co.*, 633.

Conductor of one street car and motorman of another see *Stocks v. St. Louis Transit Co.*, 633.

EMPLOYERS' LIABILITY ACT.—As to liability under negligence of switchman on street railway, see *Indiana v. Foreman* (and note), 206.

PLEADINGS.—Allegations of incompetency of motorman of car, and knowledge of defects, see *Indiana v. Foreman* (and note), 206.

INJURY TO CONDUCTOR CAUSED BY CONTACT WITH PRESUMPTION OF RISK.—A conductor while collecting running-board of an open car and was struck by a pole by the defendant near the track. In the absence of evidence that the conductor had actual knowledge of the location that its proximity was so patent as to exclude his negligence he be held to have assumed the danger, or to have been discovering it. *Hoffmeyer v. Kansas City & L. R. Co.*

OBSTACLES AT SIDE OF TRACK.—Company not liable for injury caused by contact with pole at side of track, where the conductor of its proximity and should have known of the defect. *Orleans & C. R. Co.* (and note), 335.

CONTACT WITH TROLLEY SUPPORTING POLE.—Company liable for injury to conductor by contact with pole at side of track, where the pole was located too close to track. *Withee v. Some*

TROLLEY POLE NEAR TRACK.—If conductor had knowledge of trolley supporting pole he cannot recover for injury therewith. *Houston Elect. Co. v. Robinson*, 893.

EMPLOYEES — (Continued).

Conductor assumes risk and cannot recover for injuries received by collision of cars while attempting to replace trolley, see *Simmons v. Southern Trac. Co.*, 861.

Motorman assumes risk of injury by collision with another car, see *Nelson v. Oil City St. Ry. Co.*, 860.

Assumption of risk by employee engaged in oiling cable wheels, see *Ryan v. Third Ave. R. Co.*, 804.

Injury to employee by falling in a pit in car shed, see *Mullen v. Metropolitan St. Ry. Co.*, 802.

Of telephone company, injured by electric shock from defective electric trolley wire, see *Whitworth v. Shreveport Belt Ry. Co.* (and note), 362.

Liability of owner of ice wagon for injuries to a conductor caused by negligence of his driver, see *Knickerbocker Ice Co. v. Benedix* (and note), 120.

Degree of care to avoid injuries to children on or near tracks, see *Kude v. St. Louis Transit Co.*, 597.

Exercise of best judgment in extricating child from beneath car after collision, see *Carney v. Concord St. Ry. Co.* (and note), 668.

Extra precautions at dangerous crossing, see *Eichorn v. New Orleans & C. R. L. & P. Co.* (and note), 351.

Duty to ascertain if way is clear before crossing steam railroad, see *Kopp v. Baltimore & O. S. W. Ry. Co.*, 818.

Liability of company for illegal arrest by conductor, see *Cordner v. Boston & Maine R. Co.*, 684.

EMPLOYER'S LIABILITY.

Under Indiana statute, see *Indianapolis & G. R. T. Co. v. Foreman* (and note), 206.

EVIDENCE.

EVIDENCE AS TO INJURY TO HORSE.—It is competent to show the value of the horse before a collision and that soon after, the estimates taking into account the change in the disposition of the horse. Evidence that before the collision the horse was docile and after the collision wild and vicious is admissible. *Montgomery St. Ry. v. Hastings* (and note), 1.

ASSAULT AND BATTERY BY CONDUCTOR; EVIDENCE AS TO LANGUAGE OF CONDUCTOR.—In an action brought to recover for an assault and battery committed by a conductor upon a passenger, evidence as to profane language used by the conductor to one of the plaintiff's companions was held admissible as part of the *res gestæ*. *Birmingham Ry., L. & P. Co. v. Mullen* (and note), 5.

EVIDENCE AS TO AGE AND RELATIVE SIZES OF PARTIES.—It is competent for the plaintiff to prove in such an action the age, height, and weight of the plaintiff, since the jury might well consider the relative age and the relative sizes of the parties in connection with the evidence tending to show that the conductor assaulted the plaintiff. *Birmingham Ry., L. & P. Co. v. Mullen* (and note), 5.

EVIDENCE — (Continued).

EVIDENCE AS TO CONDUCT OF PLAINTIFF.— It being charged by the defendant that the plaintiff used profane language to the conductor, it is competent for a witness to answer a question as to whether if the plaintiff made the remark he, the witness, could have heard it, or was close enough to have heard it. *Birmingham Ry., L. & P. Co. v. Mullen* (and note), 5.

STATEMENTS BY PERSONS MADE TO EMPLOYEE OF COMPANY NOT ADMISSIBLE.— In an action to recover damages for an alleged unwarranted ejection from a street car statements made by persons who saw the affair to the defendant's agent employed to investigate accidents were held inadmissible. *Foster v. Atlanta Rapid Transit Co.*, 75.

EXPERT TESTIMONY AS TO WHETHER PLAINTIFF WAS FEIGNING.— Where experts called by the plaintiff were questioned upon cross-examination for the purpose of establishing the theory that the plaintiff was feigning to a large extent the injury complained of, it is competent upon redirect examination for the plaintiff to ask such witnesses as experts whether from their knowledge of the case and from tests and observations made by them while examining the plaintiff, it was their opinion that the plaintiff was feigning such injuries. *Chicago Union Traction Co. v. Fortier*, 84.

EXAMINATION OF PHYSICIAN AS EXPERT FOR STREET RAILWAY COMPANY.—

Where a physician who is regularly employed at a stated sum *per diem* by a street railway company, is called as an expert to testify as to the injuries sustained in consequence of the alleged negligence of the company, it is competent to show that such expert has received from the company a greater compensation than the fees allowed by the statute, and that he has been frequently employed by the company as an expert, or to prove other facts and circumstances naturally creating a bias in the mind of the witness in favor of the company and against the person injured. *Chicago City Ry. Co. v. Handy*, 153.

PRECAUTIONS FOR SAFETY AFTER ACCIDENT.— The adoption of additional precautions for safety by a defendant elevated railway company after an accident cannot be proved as tending to show liability for the method used at the time of the accident. *Stevens v. Boston Elev. Ry. Co.* (and note), 435.

AS TO VIOLATION OF RULES.— The violation of rules previously adopted by the company in reference to the safety of third persons is admissible in evidence as tending to show the negligence of the defendant's motorman for which the defendant is liable. *Stevens v. Boston Elev. Ry. Co.* (and note), 435.

EVIDENCE OF SIMILAR OCCURRENCES.— Evidence as to prior assaults at an amusement park maintained by a street railway company upon colored persons and articles previously published by daily newspapers describing such occurrences was held competent. *Indianapolis St. Ry. Co. v. Dawson*, 245.

EVIDENCE — (Continued).

Testimony as to similar derailments is only admissible where they happened in the same locality and under the same conditions, see *Perras v. United Traction Co.*, 784.

MISCONDUCT BY ATTORNEY IN RESPECT TO EXCLUDED TESTIMONY.—In an action for an injury to a passenger caused by being crowded under a street car by persons attempting to board it, the court excluded testimony tending to show the conduct of similar crowds at the same place on prior occasions. Notwithstanding such exclusion the plaintiff's attorney questioned witnesses in the presence of the jury as to such prior crowds, in such a manner as to suggest the testimony which he desired to introduce. It was held that the plaintiff's attorney in failing to submit to the court's ruling in respect to such testimony was guilty of misconduct prejudicial to the defendants' rights, for which the verdict for the plaintiff was set aside. *Batchelder v. Manchester St. Ry. Co.*, 662.

AS TO EXCESSIVE SPEED; RESPONSIVENESS.—In an action for injury caused by a collision where the contention of the plaintiff was that a street railway company habitually ran its cars past the place where the accident occurred at a high rate of speed, the answer of a witness having a tendency to support such contention is not incompetent because not responsive. *Reagan v. Manchester St. Ry. Co.*, 662.

Opinion evidence as to speed of car, see *Aston v. St. Louis Transit Co.*, 631.

As to speed of car, see *Union Tract. Co. v. Vandercook*, 231.

CONFLICTING EVIDENCE.—Where the evidence is conflicting as to the direct and proximate cause of an alleged injury, the question becomes one of fact for the determination of the jury. *Omaha St. Ry. Co. v. Larson*, 654.

PROOF OF EXPERIMENT.—Proof of an experiment, without establishing the fact that the person who made the experiment is competent to do so, and that the apparatus used was of the kind and in a condition suitable for the experiment, and that it was honestly and fairly made, is without probative force. *Omaha St. Ry. Co. v. Larson*, 654.

OPINION EVIDENCE.—A witness who sees a moving car and possesses a knowledge of time and distance, is competent to express an opinion as to the rate of speed at which the car was moving. *Omaha St. Ry. Co. v. Larson* (and note), 654.

PROOF OF MUNICIPAL ORDINANCE.—Evidence of a municipal ordinance regulating the rate of speed of street cars is admissible under a general averment of negligence. *Omaha St. Ry. Co. v. Larson*, 654.

Rule of company requiring car to stop at point where passenger was injured is admissible, see *Nassau Elec. Ry. Co. v. Corliss*, 999.

Recommendation of State board of railroad commissioners that safeguard be provided, see *Baruth v. Poughkeepsie City & W. F. Elec. Ry. Co.*, 797.

As to existence of local custom permitting right of way of fire apparatus at street crossing, see *Know v. North Jersey St. Ry. Co.*, 732.

EVIDENCE — (*Continued*).

In suit for injuries alleged to have been caused by advertising banner on car deemed sufficient, see *Co. v. Haines*, 226.

EXTENSION OF STREET RAILROADS. (See *Franchise Requirement* as to certificate of public convenience. New York statute, see *New York C. & H. R. R. Elect. R. Co.*, 762.

FALSE IMPRISONMENT.

Company not liable where passenger was arrested for failure to produce transfer, see *Crowley v. Co.*, 453.

Liability of company for illegal arrest and false imprisonment of conductor, see *Cordner v. Boston & Maine R. Co.*

FARE.

Right of town selectmen in granting location to street car of fare, see *Keefe v. Lexington & B. St. Ry. Co.*, 156.
Enforcement of statutory penalty for excessive fare, see *St. Ry. Co.*, 807.

FELLOW SERVANTS. (See *Employees*.)

Conductor on one car is fellow servant of gripman
City Ry. Co. v. Leach (and note), 156.

Workman on track fellow servant of motorman, see *Co. v. Foreman* (and note), 206.

Conductor of one car and motorman of another
Stocks v. St. Louis Transit Co., 633.

Street railway not within provisions of Missouri
Metropolitan Street Ry. Co., 633.

A car repairer and a car starter, whose duty it is to start cars from a car barn, are not fellow servants.
Brooklyn Hts. R. Co., 803.

FENDERS.

ABSENCE OF FENDER NOT NEGLIGENCE.— Evidence of negligence on a car which had run over a child is not of negligence. Further evidence must be introduced of the apparatus, the way in which it operates, and its operation. In the absence of such evidence it is the duty of plaintiff's counsel to state that ordinary care required should use fenders, and for the court to instruct the jury to equip its cars with safety appliances used with prudence. *Carney v. Concord St. Ry. Co.* (and note)

FENDERS — (Continued).

OMISSION TO PROVIDE AS NEGLIGENCE.— If the jury is satisfied that a fender would have prevented the injury they are entitled to predicate negligence upon the omission to provide them. *Fritsch v. New York & Queens County Ry. Co.*, 789.

FIRE APPARATUS.

Collision with hook and ladder truck at street crossing; evidence as to right of way of fire apparatus, see *Knox v. North Jersey St. Ry. Co.*, 732; *City of New York v. Metropolitan St. Ry. Co.*, 781.

FRANCHISE. (See *Abutting Owners*; *Consents of Abutting Owners*; *Municipal Ordinances*.)

ADOPTION OF RESOLUTION FOR EXTENSION OF FRANCHISE.— A resolution extending the franchise of a street railway company, passed by a majority of a quorum of the members of a city council, is duly adopted in the absence of statutory or charter restrictions. *Thurston v. Huston* (and note), 260.

EXTENSION OF FRANCHISE NOT A NEW FRANCHISE.— Where a street railway franchise has been granted giving the company the power to maintain and operate its tracks upon certain streets "and upon such other streets and public places as said council may from time to time by resolution designate," the designation of new streets for the use of the company is not the grant of a new franchise. *Thurston v. Huston* (and note), 260.

EXTENSION OF EXCLUSIVE FRANCHISE.— The designation of additional streets in which the company may lay its tracks does not operate as an extension of the period during which the rights of the railroad company under the original franchise was made exclusive. *Thurston v. Huston* (and note), 260.

RIGHT TO CONNECT SUBURBAN LINES.— A franchise granted the relator authorized it to construct a street railway in a certain county through the streets of certain named villages. Such franchise was considered and held to authorize the company to make a necessary connection on a street of one of the villages named with a branch line built through one of the other villages. *Houghton Co. St. Ry. Co. v. Laurium*, 487.

FAILURE TO CONSTRUCT WITHIN PRESCRIBED TIME.— Where the railway was constructed within the limits of a village before the expiration of the time prescribed in the franchise the company may construct a line connecting its lines within such village with a branch line after the expiration of such period. *Houghton Co. St. Ry. Co. v. Laurium*, 487.

MODIFICATION OF REQUIREMENT AS TO STREET PAVING.— A franchise containing a requirement that a street railway company keep the pavement within its tracks and three feet on each side thereof in repair is not a private contract between the company and municipality, and is subject to modification by a subsequent act of the legislature. *Binninger v. City of New York*, 738.

FRANCHISE — (Continued).

CONFLICTING GRANTS.—Where a franchise has been granted for the use of a particular part of a certain street to one company and a subsequent grant is made to another company for the use of a substantial part of the same right of way, the subsequent grantee cannot take possession of the right of way so granted, where such possession will materially interfere with the first grantee's use thereof. *Hamilton G. & C. Tract. Co. v. Hamilton & L. Elec. Transit Co.* (and note), 808.

Right of town selectmen to limit rate of fare, see *Keefe v. Lexington & B. St. Ry. Co.*, 450.

Certificate as to public convenience and necessity for extension of street railroad, see *New York C. & H. R. R. Co. v. Auburn Interurb. Elec. R. Co.*, 762.

FREIGHT CARS.

Running freight cars on street railway without authority public nuisance, see *Daly v. Milwaukee Elec. Ry. & L. Co.*, 459.

FRIGHT OF HORSES. (See *Motorman; Vehicles, Collision.*)

DUTY OF MOTORMAN TO LESSEN SPEED OF CAR.—Where it appeared from the testimony of all the witnesses that a street car was going slowly, and that the motorman slowed it down and stopped it as soon as he saw that the plaintiff's team was becoming frightened, no inference of negligence arises, and a judgment for the plaintiff will be reversed for want of evidence to sustain it. *Lincoln Traction Co. v. Moore* (and note), 642.

DEGREE OF CARE TO AVOID.—Where it reasonably appears to the motorman in charge of a street car that a horse is so frightened as to be unmanageable, or is otherwise placing the person in charge of the horse in imminent danger, it is the motorman's duty to stop sounding his gong and also to stop the movement of the car, and thus prevent, if it may be, a threatened injury. For a failure to exercise such precaution the street railway company is liable for the resulting injuries. *Knoxville Tract. Co. v. Mullins*, 875.

QUESTION OF NEGLIGENCE OF RIDER FOR THE JURY.—Whether it was prudent or imprudent for the plaintiff, riding a young and nervous horse, to continue upon the street where cars were continually passing was a question which under the facts of the case should be settled by the jury under proper instructions. *Knoxville Tract. Co. v. Mullins*, 875.

ADVERTISING BANNER ATTACHED TO CAR.—Instructions considered and held not erroneous. Evidence as to size of banners held admissible, see *Indianapolis & G. R. T. Co. v. Haines*, 226.

CONTRIBUTORY NEGLIGENCE.—It is not contributory negligence as a matter of law to drive a horse which is afraid of the street cars on a narrow street in which there is a railway track. *Montgomery St. Ry. v. Hastings* (and note), 1.

FRIGHT OF HORSES—(*Continued*).

Duty of motorman to stop car when he sees horse on track unmanageable from fright or other cause, see *Hammond, W. & E. Chicago St. Ry. Co. v. Eades*, 254.

Collision with vehicle drawn by horse which was running away, see *Thiel v. South Cov. & Cin. St. Ry. Co.*, 308.

Duty of motorman to stop car when horse near track has become unmanageable with fright, see *Cameron v. Jersey City, H. & P. St. Ry. Co.*, 732; *Adsit v. Catskill Elec. Ry. Co.*, 785; *Wilson v. Chippewa Valley Elec. Ry. Co.*, 979.

Instruction as to negligence in driving fractious horse near track, see *Romine v. San Antonio Tract. Co.*, 898.

FUTURE SUFFERING.

Instruction deemed proper and sufficient, see *Chicago Union Tract. Co. v. Chugren*, 190.

GONG. (See *Motorman; Pedestrian; Vehicles, Collision.*)

DUTY TO SOUND GONG; KNOWLEDGE OF PROXIMITY OF CAR.—The purpose of sounding gongs on street cars is to notify persons on or about to cross the track that the car is approaching, so that they may govern their actions with safety. The failure of a motorman to sound the gong is not negligence, if a pedestrian injured in a collision sees or knows of the proximity and approach of the car. *Louisville Ry. Co. v. Colston* (and note), 318.

CONFLICTING EVIDENCE AS TO SOUNDING GONG.—Where the evidence as to whether the whistle and gong on an electric car were sounded as required by law was conflicting a question of fact is raised for the jury to determine. *Dalton v. New York, N. H. & H. R. Co.*, 429.

WHAT CONSTITUTES SUFFICIENT WARNING.—Where the evidence shows that the motorman of the car causing the injury sounded the gong at a distance of 1,000 feet from the place where the accident occurred and again sharply three times at a point 160 feet distant from such place, the charge of negligence for failure to give proper warning of the approach of the car is not sustained. *Warner v. St. Louis & Mer. R. Co.* (and note), 520.

Duty of motorman to sound gong when person is seen driving along track, see *Buren v. St. Louis Transit Co.*, 616.

Failure to sound constitutes negligence, see *Moritz v. St. Louis Transit Co.*, 619.

GRADE CROSSINGS. (See *Crossing, etc.*)

Statute prohibiting crossing of railroads at grade, see *Baltimore & Ohio Ry. Co. v. Butler Pass. Ry. Co.*, 847.

(For Index to Notes, see *ante*, p

HIGHWAYS. (See *Franchise; Streets, Defects.*)

JOINT LIABILITY FOR DEFECTS.—The negligence repair a highway and the negligence of a street defectively constructing its tracks across such there being no evidence as to any concert of act and the municipality. *Goodman v. Coal Towns Elec. Ry. Co.*, 836.

Traveler injured by reel left in highway by street *Glassey v. Worcester Cons. St. Ry. Co.*, 457.

Unauthorized construction and operation of street *Henning v. Hudson Valley Ry. Co.*, 806.

HORSE, UNMANAGEABLE. (See *Fright of Horse.*)

IMPUTED NEGLIGENCE. (See *Children; Vehicles*

Negligence of parent imputed to child, see *Mellen* 427.

Negligence of driver of vehicle not imputed to passenger *Baxter v. St. Louis Transit Co.*, 612.

Duty of person riding with driver to attempt to in dangerous speed on approaching track, see *Holden*. See note on "Imputed Negligence," p. 393.

INFANTS SUI JURIS. (See *Children.*)

INJUNCTION. (See *Abutting Owners.*)

Right of abutting owner to restrain unauthorized railway in highway, see *Henning v. Hudson Valley*. To restrain use of street by street railway with owner, see *Paige v. Schenectady Ry. Co.*, 768.

Subsequent grantee of right of way in street may not claim protection from interfering with the rights of a prior owner. *G. & C. Tract. Co. v. Hamilton & L. Elec. Transit Co.* Right of abutting owners to restrain construction of highway, see *Younkin v. Milwaukee L., H. & Tr.*

INJURIES.

RESULT OF ACCIDENT.—The question of whether the accident causing the injuries complained of was the result of negligence. *Union Trac. Co. v. Fortier*, 84.

INSTRUCTION TO JURY.

AS TO INTOXICATION OF EMPLOYEES.—An instruction to the jury in arriving at its verdict might consider "whether the accident causing the injuries complained of was the result of negligence" and "whether the servants of the defendant were together with all other evidence in the case," is proper. *Erbocker Ice Co. v. Benedict* (and note), 120.

INSTRUCTION TO JURY— (*Continued*).

- As to CONTRIBUTORY NEGLIGENCE OF MINOR.—An instruction in respect to the contributory negligence of a minor who was driving a vehicle across street railway tracks, to the effect that the jury were to determine whether he used the care which an ordinarily prudent boy of his age under the circumstances should have used, is not objectionable upon the ground that the defendant had no notice that the person in charge of the vehicle was a minor. *Dubiver v. City & Sub. Ry. Co.*, 819.
- As to degree of care for safety of passengers, see *Ilges v. St. Louis Transit Co.*, 586; *Kelly v. Metropolitan St. Ry. Co.*, 801; *Houston Elect. Co. v. Nelson*, 906.
- As to care to protect intoxicated passenger riding on running-board, see *Lawson v. Seattle & R. Ry. Co.* (and note), 945.
- As to liability for injuries caused by passenger being thrown by sudden start of car, see *Goodkind v. Metropolitan St. Ry. Co.*, 797.
- As to liability of street railway company for injuries to passenger while alighting, see *Indianapolis St. Ry. Co. v. Brown*, 250.
- As to car having stopped when passenger attempted to alight, see *Peck v. St. Louis Trans. Co.*, 508.
- As to start of car while passenger was in act of alighting, see *San Antonio Tract. Co. v. Welter*, 900.
- As to right of way of street car over vehicle, see *Doolin v. Omnibus Cable Co.* (and note), 18.
- As to negligent disregard of probable consequences of an act, see *Harrington v. Los Angeles Ry. Co.* (and note), 22.
- As to duty to keep lookout and avoid injury to persons on or near track, see *Richmond Pass. & P. Co. v. Gordon*, 986.
- As to duty of motorman to avoid collision with child crossing track, see *North Chicago St. Ry. Co. v. Johnson*, 82.
- As to duty of motorman to avoid collision with vehicle suddenly driven in front of car, see *Chicago Union Trac. Co. v. Browdy* (and note), 138.
- As to duty of motorman to avoid collision with vehicle approaching track at dangerous rate of speed, see *Holden v. Missouri Ry. Co.*, 573.
- As to degree of care required of street railway to avoid collision with vehicle driven on a narrow bridge, see *Lockwood v. Troy City Ry. Co.*, 784.
- As to right of driver to cross track in front of a car only fifty feet distant, see *Binsell v. Interurban St. Ry. Co.*, 781.
- As to liability of company for injuries caused by horses frightened at advertising banners attached to cars, see *Indianapolis & G. R. T. Co. v. Heines*, 226.
- As to negligence in driving fractious horse near track, see *Romino v. San Antonio Tract. Co.*, 898.
- As to duty of person riding with driver to induce driver to check negligent speed of vehicle, see *Holden v. Missouri Ry. Co.*, 573.

INSTRUCTION TO JURY — (Continued).

- As** to "ordinary care" of driver of vehicle in crossing track at street intersection, see *Chicago City Ry. Co. v. O'Donnell* (and note), 170.
- As** to meaning of term "ordinary care," see *Linder v. St. Louis Transit Co.*, 607.
- As** to duty of defendant in construction of roadbed and car tracks, see *Kelly v. United Traction Co.*, 805.
- As** to duty to look and listen, see *Chicago City Ry. Co. v. O'Donnell* (and note), 170.
- Where negligent acts were done wantonly, see *Aiken v. Holyoke St. Ry. Co.* (and note), 416.
- As** to damages for future pain and suffering, see *Chicago Union Tract. Co. v. Chugren*, 190.
- As** to violation of municipal ordinance, see *Monroe v. Hartford St. Ry. Co.* (and note), 59.

INTERURBAN ELECTRIC RAILWAY. (See Railroad.)

- Deemed trunk railway, see *Diebold v. Kentucky Tract. Co.* (and note), 294.
- Addition servitude in highways, see *Younkin v. Milwaukee L., H. & Tract. Co.*, 873.

INTOXICATION.

- Of driver of vehicle causing injury to conductor of street car, see *Knickerbocker Ice Co. v. Benedix* (and note), 120.
- Instruction that intoxication on part of passenger riding on running-board, injured by being thrown from car, is not negligence *per se*, sustained, see *Lawson v. Seattle & R. Ry. Co.* (and note), 945.
- Instruction as to intoxication of pedestrian constituting contributory negligence, see *Richmond Tract. Co. v. Martin's Adm's* (and note), 921.

LABORER ON STREET.

- Injured by collision with car, see *Gleason v. Worcester Cons. St. Ry. Co.* (and note), 422.
- Laborer injured while working in street by derailment of car, see *Kelly v. United Traction Co.*, 805.

LEASE.

- Liability of lessee to city for license fee imposed on each car, see *Mayor, etc., of Jersey City v. Consolidated Traction Co.*, 704.

LESSEE OF RAILROAD.

- NEGLIGENT OPERATION; LIABILITY.**—A railroad corporation, by its very incorporation under the laws of the State, assumes as one of its primary obligations that it shall operate the road under such conditions as to properly secure the safety of the general public. It is liable for injuries to persons caused by the wrongful or negligent operation of the cars upon the road, whether operated by itself or by another corporation to which it had leased it. *Munts v. Algiers & G. Ry. Co.* (and note), 341.

LICENSE FEES. (See *Taxation*.)

EFFECT OF LEASE OF STREET RAILROAD.—Where one street railway company has leased its property and franchises to another under a condition that the lessee assume all the burdens and liabilities of the lessor, the municipality can enforce against the lessee the liability of the lessor to pay a license fee for each car run on its railroad. *Mayor, etc., of Jersey City v. Consolidated Traction Co.*, 704.

LOOK AND LISTEN. (See *Children; Evidence; Instructions to Jury; Pedestrian; Vehicles*.)

Pedestrian walking on track in front of approaching car, see *Lynch v. Third Ave. R. Co.*, 785.

Failure to look where view is obstructed, see *Binns v. Brooklyn Hts. R. Co.*, 788.

Duty to look back, see *El Paso Elect. Ry. Co. v. Kendall*, 910.

Instruction as to duty, see *Richmond Pass. & P. Co. v. Gordon*, 936.

Failure not negligence *per se*, see *Chicago City Ry. Co. v. Barker* (and note), 182.

Inference from instinct of self-preservation, see *Kansas City-Leavenworth R. Co. v. Gallagher*, 282.

Duty of pedestrian, see *Heebe v. New Orleans R., L. & P. Co.*, 323.

Before reaching second track after having driven on first track, see *Chauvin v. Detroit United Ry. Co.* (and note), 478.

Rule as applied to children, see *Jett v. Central Elec. Ry. Co.* (and note), 513.

Failure does not excuse lack of due diligence to avoid collision, see *Omaha St. Ry. Co. v. Larson* (and note), 654.

Duty of passenger on alighting from car to look out for approaching car upon parallel track, see *Cleveland Elec. Ry. Co. v. Wadsworth*, 818.

Failure to look and listen before crossing track in front of approaching car is negligence, see *Day v. Columbus Ry. Co.*, 819.

See *Ries v. St. Louis Trans. Co.*, 504; *Kolb v. St. Louis Transit Co.*, 611; *Gettys v. St. Louis Transit Co.*, 614; *Twelkemeyer v. St. Louis Transit Co.*, 615; *Barrie v. St. Louis Transit Co.*, 617; *Fanning v. St. Louis Transit Co.*, 621.

MASTER AND SERVANT. (See *Employees*.)

MOTORMAN. (See *Children; Employees; Ordinary Care; Passengers; Pedestrians; Vehicles, Collision*.)

DUTY OF MOTORMAN TO AVOID COLLISION.—The plaintiff testified that when they reached the street intersection where the collision occurred they stopped, looked, and listened, and did not see or hear a car approaching. The car had a headlight which lit up the track for from fifty to seventy-five feet in front of the car. There was no light upon the wagon in which the plaintiff was riding. It was held that if it was true that the plaintiff

MOTORMAN — (*Continued*).

could not see the car, it could not be said that the motorman could see the wagon in which the plaintiff was riding. But even if the motorman could have seen the plaintiff, he had a right to assume that the plaintiff could also see the car, and that the plaintiff would stop before getting into a position of peril. *Petty v. St. Louis & Mer. R. R. Co.*, 554.

DUTY TO CONTROL CAR AT STREET INTERSECTION.—It is the duty of the motorman upon a street railway, when approaching an intersecting street, to have his car so far under control that he will not endanger the safety of other persons on foot or in vehicles, engaged in the lawful and customary use of the highway in question. *Searles v. Elizabeth, P. & C. J. Ry. Co.* (and note), 706.

Duty to avoid collision with bicyclist known to be in peril, see *Harrington v. Los Angeles Ry. Co.* (and note), 22.

Duty to avoid striking child crossing track, see *North Chicago St. Ry. Co. v. Johnson*, 82.

Degree of care to avoid injuries to children on or near tracks, see *Kube v. St. Louis Transit Co.*, 597; *Jett v. Central Elec. Ry. Co.* (and note), 513; *McDonald v. Metropolitan St. Ry. Co.*, 788.

Required to stop car when child is in perilous position on track, see *Meeker v. Metropolitan St. Ry. Co.*, 536.

Question as to whether car could have been stopped after the perilous situation of the child upon the track was discovered is for the jury, see *Carney v. Concord St. Ry. Co.* (and note), 668.

Effort to avoid collision with child who had fallen upon track, see *Solurba v. Metropolitan St. Ry. Co.*, 789.

Duty to avoid collision with fire apparatus, see *City of New York v. Metropolitan St. Ry. Co.*, 781.

Duty to keep a lookout and avoid injury to persons on or near track, see *Richmond Pass. & P. Co. v. Gordon*, 936.

Instruction as to ordinary care in avoiding collision with pedestrian, see *Warner v. St. Louis & Mer. R. R. Co.* (and note), 520.

Duty to exercise care in starting car while pedestrian is crossing street, see *McLeland v. St. Louis Transit Co.*, 621.

Duty to avoid collision with vehicle at street crossing, see *Union Tract. Co. v. Vandercook*, 231; *Moran v. Leslie*, 254; *Fellenz v. St. Louis & Sub. Ry. Co.*, 620.

Duty to avoid accident at crossing, where vehicle was suddenly driven in front of car, see *Chicago Union Trac. Co. v. Browdy* (and note), 138.

Duty to check speed of car when vehicle is seen approaching track at negligent rate of speed, see *Holden v. Missouri Ry. Co.*, 573.

In view of evidence held that motorman could not be charged with negligence in concluding that plaintiff could drive across track before car struck him, see *Roenfeldt v. St. Louis & Sub. Ry. Co.* (and note), 562.

MOTORMAN — (*Continued*).

Duty of motorman to avoid collision with vehicle driven along track, see *Baxter v. St. Louis Transit Co.*, 612.

Instruction as to exercise of care by motorman to avoid collision with vehicle driven along track, see *Twelckemeyer v. St. Louis Transit Co.*, 615.

Duty to avoid injury when horse is unmanageable from fright, see *Hammond, W. & E. Chicago St. Ry. Co. v. Eades*, 254; *Thiel v. South Cov. & Cin. St. Ry. Co.*, 308; *Lincoln Tract. Co. v. Moore* (and note), 642; *Cameron v. Jersey City, H. & P. St. Ry. Co.*, 732; *Adsit v. Catskill Elec. Ry. Co.*, 785; *Knowville Tract. Co. v. Mullins*, 875.

Gross negligence in running down vehicle where team was seen to be unmanageable through fright, see *Wilson v. Chippewa Valley Elec. Ry. Co.*, 979.

Duty to sound gong, see *Louisville Ry. Co. v. Colston* (and note), 318.

Negligence in starting car before passenger has boarded it, see *Clinton v. Brooklyn Hts. R. Co.*, 791.

Injured by collision; assumption of risk, see *Nelson v. Oil City St. Ry. Co.*, 860.

MUNICIPAL ORDINANCES. (See *Franchise*; *Speed*.)

EQUIPMENT OF CARS WITH AIR OR ELECTRIC BRAKES.— A municipal ordinance requiring the equipment of street cars with air or electric brakes is a reasonable regulation of the conduct of a street railway company's business. Where the ordinance appears upon its face to be a safeguard against danger to the public it will ordinarily be presumed to be valid. If the regulation can fairly be said to tend toward a better and safer condition, the discretion of the common council in passing the ordinance will not be interfered with. *People v. Detroit United Ry. Co.* (and note), 460.

INSTRUCTION AS TO VIOLATION OF ORDINANCE.— Whether or not the violation of an ordinance is the proximate cause of the injury is a question of fact for the jury under proper instructions from the court; so that an instruction erroneously construing and applying such ordinance is material and harmful, and sufficient cause for reversal. *Monroe v. Hartford St. Ry. Co.*, 59.

Application to trailers of ordinance requiring fender and conductor and motorman on each car, see *Von Diest v. San Antonio Tract. Co.*, 902.

Requiring street car to be stopped when signaled, see *Lockyer v. Covert*, 816.

NEGLIGENCE. (See *Children*; *Evidence*; *Fire Apparatus*; *Instructions to Jury*; *Look and Listen*; *Motorman: Passenger*; *Pedestrian*; *Speed*; *Vehicles*, etc.)

NEWSBOY. (See *Children*; *Trespasser*.)

RIDING ON CAR; LIABILITY FOR INJURY.— A street railway company owes no duty to a newsboy who is a trespasser upon its cars, except to refrain from willfully, recklessly, and wantonly exposing him to injury. *Albert v. Boston Elev. Ry. Co.*, 448.

NEWSBOY — (*Continued*).

Injured while riding as trespasser by wanton neglect. *Ry. Co. v. O'Donnell* (and note), 147.

OBSTACLES NEAR TRACK. (See *Employees; Passenger*;
Causing injury to passenger, see *Cummings v. W.*
note), 278.

Company not liable for injury to conductor, see *Go-*
R. Co. (and note), 335.

Company liable where pole was negligently located.
Tract. Co., 380.

Conductor injured by trolley supporting pole, see
& L. R. Co., 288; *Houston Elect. Co. v. Robinson*

ORDINARY CARE. (See *Instructions to Jury;*
Pedestrian; Vehicles.)

Of driver of vehicle in crossing track at street inter-
Ry. Co. v. O'Donnell (and note), 170.

Instruction as to, held sufficient, see *Chicago Unio*
190.

If evidence as to exercise of ordinary care is only ex-
not to be submitted to jury, see *Gleason v. Wor*
422.

Instruction as to meaning of term considered and h-
v. St. Louis Transit Co., 607.

Where wanton negligence of company's motorman
not show that he exercised ordinary care to av-
Holyoke St. Ry. Co. (and note), 416.

Proof of want of ordinary care on part of driver
gross negligence of motorman, see *Wilson v. Ch*
Co., 979.

PASSENGERS. (See *Arrest of Passenger; Assault*;
ductor; Employees; Presumption of Negligence.)

ALIGHTING FROM CAR AT DANGEROUS PLACE; EX-
Street railway companies are bound to use the highest
skill and the utmost foresight in the performance of their
common carriers in receiving, transporting, and discharging
passengers and are responsible for any injury to a passenger
for failure to take reasonable precaution for the prevention of such
injury. Street railway company having knowledge of the fact
that a street permits a passenger to alight without danger,
resulting from an excavation in a street and causing
injuries caused thereby. *Fort Wayne Tract. Co. v*
221.

(For Index to Notes, see *ante*, p. xv.)

PASSENGERS — (Continued).

ALIGHTING FROM MOVING CAR; INSTRUCTIONS TO JURY.—The plaintiff was injured by the sudden starting of the car while in the act of alighting; it appeared that she did not wait for the car to stop before stepping off. An instruction to the effect that if the car was so nearly stopped that an ordinarily prudent person would have deemed it safe to alight therefrom, and while attempting to alight the plaintiff was thrown to the ground by the motorman in charge of the car suddenly starting it before she had alighted, she would be entitled to recover damages for the injury, is not erroneous. *Indianapolis St. Ry. Co. v. Brown*, 250.

INJURED WHILE ALIGHTING FROM CAR; FAILURE TO NOTIFY CONDUCTOR OF INTENTION.—The plaintiff was injured while alighting from one of the defendant's cars. It appeared that the car had reached the end of the line, and the trolley pole had been changed to the other end of the car, during which time the plaintiff indicated no intention of alighting; the car remained stationary for a sufficient length of time to enable all passengers to alight. As the car was about to start the plaintiff, without notifying the conductor of his intention, attempted to alight from the car, and in so doing he was thrown to the ground. It was held that the evidence was not sufficient to show negligence on the part of the defendant. *Spaulding v. Quincy & B. St. Ry. Co.* (and note), 441.

INJURED WHILE ALIGHTING BY SUDDEN START OF CAR.—Where there is testimony that a passenger attempted to get off after the car had stopped; that the defendant's employee in charge of the car gave the signal to start before she had alighted; that he could have seen her if he had looked, the question of the negligence of the defendant and the contributory negligence of the plaintiff is for the jury. *Meade v. Boston Elev. Ry. Co.*, 456.

INJURY WHILE ALIGHTING; BURDEN OF PROOF.—The plaintiff was injured in attempting to alight from one of the cars of the defendant. An instruction to the effect that the burden of proof as to the act of negligence complained of rests upon the plaintiff throughout the case is not objectionable because it fails to distinguish between the act of negligence stated in the petition and the contributory negligence charged in the answer, where there was in fact no suggestion in the case of contributory negligence. *Peck v. St. Louis Trans. Co.*, 508.

CARE TO AVOID INJURY TO ALIGHTING PASSENGER.—The court instructed the jury that it was the duty of street railway companies to use extraordinary care and caution to see that passengers are not injured in getting on or off their cars, and that it was the duty of the defendant in this case, through its servants and employees, to take due and proper precaution to see that no one was in the act of alighting before moving the car ahead after it had stopped at a regular point for stopping. *Richmond Tract. Co. v. Williams*, 927.

(For Index to Notes, see *ante*, p.

PASSENGERS — (Continued).

CONTRIBUTORY NEGLIGENCE UPON PART OF PASSENGER.— A passenger on a street car is guilty of negligence in getting off from the car while it is in motion, and while she is in the seat until the car had fully stopped, and when the car was started, and while she was in the car, and thrown to the ground and injured by the sudden conduct cannot be considered as constituting contributory negligence. *Richmond Tract. Co. v. Williams*, 927.

Reasonable time to be allowed to passenger for alighting. *Hannon v. St. Louis Transit Co.*, 624.

Injury caused by attempting to alight from car in response to plaintiff's signal, by sudden start of car. *Louis Transit Co.*, 625.

Injured while attempting to alight while car was increasing acceleration of speed, see *Duffy v. St. Louis Transit Co.*

Injury caused by attempting to alight while car was moving. *Paine v. La Crosse City Ry. Co.* (and note), 988.

Injured while stepping off backward from the rear of car, see *Scanlon v. Philadelphia Rap. Trans. Co.*

Injury by sudden start of car while alighting, see *Brazie v. St. Louis Transit Co.*, 624; *Scannell v. St. Louis Transit Co.*, 626; *Paganini v. North Jersey St. Ry. Co.*, 731; *Welter*, 900.

PASSENGER CARRIED BEYOND DESTINATION; INJURY WHILE RETURNING.— The plaintiff, a passenger of the defendant, was carried beyond her destination, and in getting back from the place where the car stopped desired to alight she fell upon an icy sidewalk and was injured. It was held that the negligence of the defendant in carrying her beyond her destination was not the proximate cause of her injury, and the plaintiff could not recover. *Haley v. St. Louis Transit Co.*, 548.

Injury caused by passenger being carried beyond destination to an unsafe place, see *Lynch v. St. Louis Transit Co.*

INJURED IN TRANSFERRING.— Where it appears that a passenger received a transfer slip authorizing him to ride on another car, and was injured while transferring from one car to another, the company was liable as for an injury to a passenger. *Co. v. Carroll* (and note), 124.

PRESUMPTION OF NEGLIGENCE FROM FALL OF TRAIN.— It is necessary for the plaintiff to show what caused the fall. Proof being made that the plaintiff was injured, the burden of explaining how the injury occurred is on the defendant.

PASSENGERS — (Continued).

sumption of negligence is upon the defendant. *Chicago City Ry. Co. v. Carroll* (and note), 124.

Injured in attempting to board car; commencement of relationship of passenger and carrier, see *O'Mara v. St. Louis Transit Co.*, 627.

Inference to be drawn by passenger from fact that motorman lessened speed of car, see *Mulligan v. Metropolitan St. Ry. Co.*, 787.

Where injury was occasioned by plaintiff being crowded under a car by persons attempting to board it, evidence as to similar crowds at the same place on prior occasions was excluded, see *Batchelder v. Manchester St. Ry. Co.*, 663.

It is not negligence for a street car to start while a passenger is in the act of passing from the platform into the car, see *Sharp v. New Orleans City R. Co.* (and note), 332.

Injured by sudden start of car before safely seated, see *Pelly v. Denison & S. Ry. Co.*, 909.

Injured by sudden start of car while attempting to board it; it is not contributory negligence as a matter of law to get upon a street car while in motion, see *Clinton v. Brooklyn Hts. R. Co.*, 791.

Injured in attempting to board a slowly moving car by sudden start of car, see *Maguire v. St. Louis Transit Co.*, 629.

Injured while boarding car by sudden start, see *Plum v. Metropolitan St. Ry. Co.*, 792; *Mulligan v. Metropolitan St. Ry. Co.*, 787.

Injured while attempting to board car by sudden start; contradictory evidence, see *Northington v. Norfolk Ry. & L. Co.*, 932.

Injury caused by start of car while attempting to board it; rule of company requiring cars to stop at point where accident occurred is admissible, see *Nassau Elec. Ry. Co. v. Corliss*, 999.

INJURED BY BEING THROWN FROM OPEN CAR BY A SUDDEN LURCH.—The plaintiff, a passenger on one of the defendant's street cars, which was a four-wheel summer car, the trucks being in the center, was thrown therefrom into the street by a sudden jerk or lurch. At the time she was thrown she was standing in the body of the car. It was held that the jerk or lurch being sufficient to throw the plaintiff from the place where she stood into the street justified a finding that the car was negligently operated. *Ilges v. St. Louis Transit Co.* (and note), 586.

DEGREE OF CARE FOR SAFETY OF PASSENGERS.—An instruction that a street car company is bound to use the highest degree of care for the safety of its passengers, together with an instruction to the effect that if the motorman was negligent and his negligence caused the car to lurch, etc., plaintiff could recover is not erroneous, although a definition of the term "highest degree of care" was not included therein. *Ilges v. St. Louis Transit Co.* (and note), 586.

Riding on step of car, injured by being thrown by motion of car, see *Moskowitz v. Brooklyn Hts. R. Co.*, 794.

PASSENGERS — (Continued).

degree of practical care and diligence shall be observed that is consistent with the mode of transportation adopted; and the sufficiency of cars and appliances is to be measured by those which have been proved by experience to be most efficacious in known use in the same business. *Palmer v. Warren St. Ry. Co.* (and note), 839.

Injury caused by collision of cars; presumption of negligence, see *Robinson v. St. Louis & Sub. Ry. Co.*, 630.

Injury caused by collision of street car of one company with car of another company attempting to pass a cross-over switch, see *Klinger v. United Traction Co. et al.*, 799.

INJURED BY BEING STRUCK BY PASSING WAGON; PRESUMPTION OF NEGLIGENCE; CONTRIBUTORY NEGLIGENCE.—Where a passenger on an open car is injured by a marble slab projecting from a passing wagon, which collided with the car, the occurrence of the accident raises a presumption of negligence on the part of the defendant, and the burden is upon it to show that the injury did not result from its negligence, or that the plaintiff was himself guilty of negligence directly contributing to its occurrence. It being shown that the plaintiff did not see the passing wagon and was unaware of its danger until he was struck and injured, it is for the jury to determine as to whether the plaintiff was guilty of contributory negligence. *Jones v. United Rys. & Elec. Co.* (and note), 406.

INJURED BY COLLISION WITH VEHICLE.—The mere fact of a collision with vehicle causing an injury to a passenger does not establish liability of company. *Houston Elect. Co. v. Nelson*, 906.

Injury caused by collision with vehicle; negligence of the driver of a vehicle does not excuse negligence of company, see *Frank v. Metropolitan St. Ry. Co.*, 798.

Injured by shaft of an express wagon puncturing side of car, see *Kelly v. Metropolitan St. Ry. Co.*, 801.

INJURED BY BEING STRUCK BY TROLLEY POLE AT THE SIDE OF A CAR.—The plaintiff, while a passenger on one of the open cars of the defendant, momentarily leaned outside the car and was struck by a trolley pole erected close to the side of the track. He did not know of the proximity of the pole to the car. The car was not screened on either side, and was so constructed that passengers could enter and depart from either side. It was held that under the circumstances the question of the contributory negligence of a passenger was one of fact for the jury. *Cummings v. Wichita R. & L. Co.* (and note), 278.

DEFECTIVE DEVICE FOR OPENING AND SHUTTING DOOR.—It was alleged that a patented device for opening and shutting the sliding door of a vestibule to a car was unsafe, causing an injury to the finger of the intestate, from the shock of which he fainted, and fell from the car. In the absence of proof that the plaintiff's intestate hurt his finger because of the de-

(For Index to Notes, see *ante*, p. xv.)

PASSENGERS — (*Continued*).

fective device, and that the injury to the finger caused him to faint, it was held that the jury would not have been warranted in finding that the intestate's fall was caused by such injury. *Williams v. Citizens' Elec. St. Ry. Co.*, 433.

Burns received from a floor plate heated by friction caused by the overcrowding of a street car, see *Powell v. Hudson Valley Ry. Co.*, 800.

Injury caused by overcrowding station platform, see *Dittman v. Brooklyn Hts. R. Co.*, 801.

Injured by defective gate on platform, see *Aston v. St. Louis Transit Co.*, 631.

Injured by kicking horse attached to car, see *Roedecker v. Metropolitan St. Ry. Co.*, 801.

Injured by being struck by a car upon another track after having alighted at a crossing, see *Beers v. Metropolitan St. Ry. Co.*, 786.

Failure of passenger on alighting from car to look out for an approaching car upon a parallel track before crossing it, see *Cleveland Elec. Ry. Co. v. Wadsworth*, 818.

UNLAWFUL ARREST.—The plaintiff was a passenger on a car of the defendant and before arriving at his destination the car was stopped and the passengers directed to alight and wait for another car. A number of cars approached and passed the passengers without stopping. One of the passengers as another car approached picked up a rock and threw it through a car window, whereupon the motorman stopped the car and the group of passengers got on board. The plaintiff was accused of being the man who threw the stone, and was subsequently arrested and tried and found not guilty. In an action for malicious prosecution against the street railway company the jury returned a verdict of \$1,500 for actual damages and \$1,000 for exemplary damages. It was held that, although the plaintiff was a peaceful and law-abiding citizen, the verdict was excessive and should be set aside. *Farrell v. St. Louis Transit Co.* (and note), 592.

ASSAULT.—The aggravating conduct of a passenger assaulted by a conductor may be considered in determining compensatory damages. *Freedman v. Metropolitan St. Ry. Co.*, 802.

Assault by conductor, see *Sonnem v. St. Louis Transit Co.*, 632.

Ejection for failure to pay fare, see *Gottwald v. St. Louis Transit Co.*, 632.

PEDESTRIAN. (See *Children; Instructions to Jury; Look and Listen; Motorman; Speed*.)

STRUCK BY RUNNING-BOARD.—Pedestrian on edge of sidewalk struck by running-board of car projecting over sidewalk cannot recover unless shown to have exercised some care to avoid injury. *Hayden v. Fairhaven & W. R. Co.*, 67.

PEDESTRIAN — (*Continued*).

LOOK AND LISTEN.— It is the duty of a pedestrian about to cross track to exercise faculties of sight and hearing, and in other respects to take ordinary precautions to avoid collision with the cars. If he do look and listen, he will be held to an apprehension of that which should have been seen and heard, and, if he fail to look and listen, he will be charged with the same liability in case of disaster as if he had done so. But a traveler may cross an electric street railway track in front of an approaching car which he plainly sees and distinctly hears, and not be negligent. If, in view of his distance from the car, the rate of speed of its approach, and all other circumstances of the event, a reasonably prudent man would accept the hazard and undertake to cross, a traveler may do so, and the propriety of his conduct is ordinarily a question for the jury. *Kansas City-Leavenworth R. Co. v. Gallagher*, 282.

ACCIDENT AT CROSSING; DUTY TO LOOK AND LISTEN.— The recognized rule is that before attempting to cross a railway track a person should stop, look, and listen, and it will hardly do to substitute for it a rule to the effect that, being at a distance from a crossing, toward which he and an electric or steam car are traveling, he may then form an opinion as to which of the two will get there first, and, acting upon that opinion, essay the crossing without giving himself further concern upon the subject. *Heebe v. New Orleans & C. R. L. & P. Co.*, 323.

FAILURE TO LOOK BEFORE CROSSING; CONTEMPORANEOUS NEGLIGENCE.— The plaintiff's intestate before going upon the track could have seen and heard the approaching car, but did not look, listen, or pay any attention whatever to it. It was held that his negligence was not only concurrent with that of the defendant's motorman, but contemporaneous and coincident with his injury, and that there was no room in the case for the interposition of the humanitarian doctrine. *Ries v. St. Louis Trans. Co.*, 504.

Walking upon track in front of an approaching car without looking is contributory negligence, see *Lynch v. Third Ave. R. Co.*, 785.

DANGEROUS CROSSING; EXTRA PRECAUTIONS.— Where a crossing is especially dangerous on account of its locality or mode of construction, or because the view is restricted or the track is curved, it is the duty of the company to exercise such care and take such precautions as the dangerous nature of the crossing requires. The company's employees are held, without notice, to have had knowledge of the visible dangerous conditions, and are bound, without specific directions, to take the steps necessary for the public safety. *Eichorn v. New Orleans & C. R. L. & P. Co.* (and note), 351.

NEGLECTANCE IN NOT TAKING PROPER PRECAUTIONS.— Where trainmen have reason to believe there are persons in exposed positions on the tracks, as over unguarded crossings in populous districts in cities, or where the public are wont to cross with such frequency and numbers as to be known

(For Index to Notes, see *ante*, p. 100)

PEDESTRIAN — (Continued).

to them, they will be held to a knowledge of the danger, and not taking proper care and precaution, and thus being responsible for injuries received in consequence thereof, there was negligence on the part of the person in charge of the part of the servant after seeing the danger.

4 C. R. L. & P. Co. (and note), 351.

INJURED WHILE CROSSING TRACK TO TAKE CAB.-

track to take a car was told to hurry up by the car, and was struck by a car approaching from the rear. Upon the theory that his attention might have been attracted by the conductor, the question of his contributory negligence was submitted to the jury. *Stillings v. Metropolitan St. Ry. Co.*, 756.

Collision with pedestrian about to board car; failing to see him because view was obstructed is not contributory negligence. *Binns v. Brooklyn Hts. R. Co.*, 788.

DUTY TO AVOID COLLISION.—The jury might we

stances of the case that the motorman was negligent in not considering the possibility of a pedestrian emerging from behind the building on the track, shutting off his vision at a street crossing, and in failing to stop the track in front of his car, and in failing to avoid a collision with a pedestrian so attempting to cross the track.

Milwaukee Elec. Ry. & L. Co., 968.

ORDINARY CARE OF MOTORMAN.—In the absence of

trian was on the track when the car approached, saw him in a dangerous place in time to avoid collision, and was negligent in not stopping the car, the fact of negligence on the part of the motorman in not stopping the car to check its speed so as to enable the decedent to get off the car without peril is not sustained. *Warner v. St. Louis & N. W. Ry. Co.*, 200 Mo. 520.

PROOF OF NEGLIGENCE.—The burden of proving

upon the plaintiff. It is not enough to show a
There must be a direct connection between the
injury, and the negligence must be the proximate
Warner v. St. Louis & Mer. R. R. Co. (and note)

CONJECTURAL CAUSE.—If the injury may have

causes, for one of which, and not the other, it must be shown with reasonable certainty that defendant is liable produced the result; and if conjecture, the plaintiff must fail in his action *Merr. R. R. Co.* (and note), 520.

RIGHT OF WAY OVER STREET CAR TRACKS.—A pe

cross the tracks of a street railway at other points, the driver should yield the right of way to an approaching street car, and should, however, exercise every care in his power to avoid collision.

(For Index to Notes, see *ante*, p.

PEDESTRIAN — (Continued).

a pedestrian where he has notice of the latter's ;
v. *Colston* (and note), 318.

Collision while crossing street diagonally between
Galveston City Ry. Co. v. Hanna, 910.

Injured while attempting to cross track in front
contributory negligence, see *Richmond Tract.*
(and note), 921.

COLLISION WITH PEDESTRIAN; CONTRIBUTORY NEGLIGENCE.—
intestate was struck and killed by one of the defendants
evidence was conflicting as to the way in which
It appeared from the plaintiff's evidence that the
the track to avoid travelers approaching him on the
by a car from the rear. In the absence of evidence
dised due care in stepping from the track out of
plaintiff could not recover since his intestate
contributory negligence. *Dooley v. Greenfield &*
Ordinary care to avoid accident by person injured
Gleason v. Worcester St. Ry. Co. (and note), 422.

STANDING BETWEEN DOUBLE TRACKS.—The general
upon to know or take in at a glance that the
tracks in a city is not wide enough to afford protection
on that space, or to know the length and width
the road. A person has the right to assume that
and to assume that it was not likely that two cars
moving, while he was in that position. *Eichorn*
L. & P. Co. (and note), 351.

Injured by collision at a street crossing while standing
south bound tracks, see *Mulligan v. Third Ave. R.*

Injured by crossing in front of car which had stopped
by the sudden start of the car, see *McLeland v. S.*

Collision with pedestrian at crossing; failure to
Fanning v. St. Louis Transit Co., 621.

Injured while crossing a street at a street intersection
Hts. R. Co., 787.

Injured by falling over cord stretched across a
trench, see *Schiverea v. Brooklyn Hts. R. Co.*, 790.

PLATFORM, PASSENGER RIDING ON. (See *Passenger*)

INJURY TO PASSENGER ON PLATFORM OF CROWDED CAR.—
CONTRIBUTORY NEGLIGENCE.—While a passenger was riding on the
the gate on the side next to the tracks of the
company he was struck by a car of the latter company
site direction and seriously injured. He was in a
position, but the conductor accepted his fare without

PLATFORM, PASSENGER RIDING ON — (Continued).

It was held that the defendant assuming to carry the plaintiff in such dangerous position must use care for his safety in proportion to the danger; and at the same time the plaintiff was bound to observe such care for his own protection as an ordinarily prudent man would be expected to observe in a like position under like conditions. The question as to whether the taking of such a position was contributory negligence is for the jury. *Parks v. St. Louis & Sub. Ry. Co.* (and note), 527.

ASSUMPTION OF RISK OF DANGEROUS POSITION.— A passenger never assumes the risk of a street railway company's negligence. He only assumes the risk incident to traveling on the company's cars, according to the circumstances and conditions of his position, not connected with the company's negligence. If the injury resulted not alone from the danger incident to the act of traveling under the given circumstances and conditions, but resulted because to that danger was added the consequence of the negligent act of the carrier, there was no such assumption of risk as would relieve the company from liability. *Parks v. St. Louis & Sub. Ry. Co.* (and note), 527.

Passenger injured by being thrown from platform while rounding curve, see *Gatens v. Metropolitan St. Ry. Co.*, 793.

Injury to passenger riding on step of crowded street car, by being thrown by motion of car, see *Moskowitz v. Brooklyn Hts. R. Co.*, 794.

PLEADINGS.

SPECIFIC ALLEGATIONS OF NEGLIGENCE.— Where three of six counts in a declaration allege general negligence, the fact that the other three allege specific negligence does not make it incumbent upon the plaintiff to produce evidence substantiating such specific charges, nor relieve the defendant from its burden of rebutting the presumption of negligence. *Chicago City Ry. Co. v. Carroll* (and note), 124.

ALLEGATION AS TO RECKLESS AND INCOMPETENT MOTORMAN.— An allegation in a complaint stating that the injury complained of was caused by the negligence of a motorman in the service of the defendant who was a reckless and incompetent motorman and was known to be such by the appellant long before the collision in which the plaintiff was injured, does not sufficiently meet the requirement that in such cases the complaint must allege that the plaintiff had no knowledge of the recklessness and incompetency of the motorman. And an allegation of the want of knowledge of such recklessness and incompetency on the part of the injured employee must be as broad as the allegation of knowledge on the part of the employer. *Indianapolis & G. R. T. Co. v. Foreman* (and note), 206.

ALLEGATION AS TO DEFECTIVE CONSTRUCTION OF WORK CAR.— It appearing that the proximate cause of the plaintiff's injuries was the running of another car into and upon said work car, and not the negligent con-

PLEADINGS — (Continued).

struction and equipment of said work car, the allegations in the complaint as to the age and negligent construction and equipment of the work car, and the danger of operating it on the main line may be disregarded. *Indianapolis & G. R. T. Co. v. Foreman* (and note), 206.

EMPLOYER'S KNOWLEDGE OF DEFECTS MUST BE ALLEGED.—A complaint, in an action by an employee against his employer for injuries received while in his employment, must allege that the employer had no knowledge of the defects or imperfections causing the injuries complained of. *Indianapolis & G. R. T. Co. v. Foreman* (and note), 206.

Sufficient allegation as to company's negligence where precise cause of accident was known to company and not to passenger, see *Powell v. Hudson Valley Ry. Co.*, 800.

Allegation as to cause of sudden stopping of car causing injury to passenger, see *McCauley v. Rhode Island Co.*, 865.

Failure to allege negligence, see *Daly v. Milwaukee Elect. Ry. & L. Co.*, 459.

PRESUMPTION OF NEGLIGENCE. (See *Evidence; Instructions to Jury; Passengers.*)

APPLICATION OF DOCTRINE OF RES IPSA LOQUITUR.—The maxim of *res ipsa loquitur* is applicable, and a presumption of negligence on the part of the defendant arises where it appears that the car which struck the wagon of the plaintiff's intestate was being run without a motorman. *Chicago City Ry. Co. v. Barker* (and note), 182.

REBUTTAL OF PRESUMPTION.—It appears from the testimony of the motorman that he fell from the car because of an electric shock received by him while operating such car. Other testimony tended to show that the motorman was not negligent in the performance of his duty. It was held that the question as to whether the defendant's evidence sufficiently rebutted the presumption of negligence was one of fact for the jury. *Chicago City Ry. Co. v. Barker* (and note), 182.

Where passenger was injured by defective gate on platform, see *Aston v. St. Louis Transit Co.*, 631.

Passenger thrown from car by sudden lurch, see *Ilges v. St. Louis Transit Co.* (and note), 586.

Passenger injured by fall of trolley pole, see *Chicago City Ry. Co. v. Carroll* (and note), 126.

Where passenger is injured by collision of cars, see *Robinson v. St. Louis & Sub. Ry. Co.*, 630; *Palmer v. Warren St. Ry. Co.* (and note), 839.

Where a passenger was injured by a collision of a street car of one company with the car of another company attempting to pass a cross-over switch, see *Klinger v. United Traction Co. et al.*, 799.

Arising from derailment of car causing injury to passenger, see *Heyde v. St. Louis Transit Co.*, 630; *Smith v. Milwaukee Elect. Ry. & L. Co.* (and note), 962.

RIGHT OF WAY— (*Continued*).

Statute giving fire apparatus right of way on streets, see *City of New York v. Metropolitan St. Ry. Co.*, 781.

Pedestrian should yield right of way to approaching car at a point other than a regular crossing, see *Louisville Ry. Co. v. Colston* (and note), 318.

RUNNING-BOARD. (*See Passengers; Platform, Passenger Riding on.*)

OVERLAPPING SIDEWALK.—Where the running-boards of street cars overlap the edge of the sidewalk, it is the duty of the motorman to use reasonable care to avoid injury to persons on the sidewalk; and reasonable care may mean great care, depending upon the circumstances, and the greater the overlapping, the greater the degree of care which must be exercised. An instruction to this effect was sustained. *Hayden v. Fairhaven & W. R. Co.*, 67.

USE OF STREET CAR WITH RUNNING-BOARD.—The mere use of a street car with a running-board in streets so narrow that such boards overlap the sidewalk does not of itself constitute *prima facie* negligence. *Hayden v. Fairhaven & W. R. Co.*, 67.

Care to be exercised to avoid injury to intoxicated passenger riding on running-board, see *Lawson v. Seattle & R. Ry. Co.* (and note), 945.

Duty of company to protect passengers permitted to stand upon running-board of over-crowded car, see *Sheeron v. Coney Island & Brooklyn R. Co.*, 796.

SELF-PRESERVATION. (*See Look and Listen.*)

Doctrine as to instinct of, see *Kansas City-Leavenworth R. Co. v. Gallagher*, 282.

SPECIFIC PERFORMANCE.

An electric railway company cannot be compelled to perform its duties to the public under its franchise by specific performance, see *Matthews v. Southern Ohio Traction Co.*, 817.

SPEED. (*See Children; Evidence; Instructions; Motorman; Pedestrian; Vehicle, Collision with.*)

EVIDENCE AS TO SPEED.—The question being in dispute as to whether the car was running at a high and dangerous speed, and as to whether such speed was so great as to constitute negligence, it was proper to admit evidence as to the speed of the defendant's cars at the place where the accident occurred for ten days prior to such accident. *Union Tract. Co. v. Vandercook*, 231.

Opinion evidence as to speed of car, see *Aston v. St. Louis Transit Co.*, 631.

The answer of a witness tending to support a contention that the rate of speed was excessive held competent, see *Reagan v. Manchester St. Ry. Co.*, 662.

STATION, DEFECTIVE — (*Continued*).

had no right to enter upon the adjoining grounds to repair it, it could not be held liable for any injury resulting from the use thereof; but the court held that since the contrivance was used by the defendant's passengers alone, and it knew that it was being so used, it was bound to at least ordinary care in seeing that it was fit for the purpose for which it was intended. *Cotant v. Boone Sub. Ry. Co.* (and note), 269.

LIABILITY OF DEFENDANT FOR DEFECTIVE CONDITION OF STILE.—The duty of a carrier of passengers does not end when the passenger has alighted from its cars. It must provide reasonably safe means of access to and from its stations or terminals for the use of its passengers, and the passengers have a right to assume that the means of egress provided are reasonably safe. The defendant having knowledge of the construction of the stile and impliedly inviting its passengers to use it is liable for its defective condition, although it was erected by a stranger. *Cotant v. Boone Sub. Ry. Co.* (and note), 269.

INJURY TO PASSENGER ON STATION PLATFORM; NEGLIGENCE.—The plaintiff's intestate was standing upon a platform maintained by the defendant, waiting for a car, and was struck by the footboard of a car passing the platform. It was held that in the absence of reasonable evidence of any specific act of negligence on the part of the employees of the defendant, it was improper to submit the case to the jury. *State to Use of Egner v. United Rys. & Elec. Co.* (and note), 388.

STEAM RAILROAD. (See *Crossing Railroad by Street Railroad; Railroad; Railroad Crossing*.)

OPERATION OF RAILROAD IN STREET.—Where a steam railroad company operates its railroad in a street its trains must be run with due regard to the safety of persons rightfully using the street. The mere fact that the person drives upon the tracks of such a railroad in a street does not constitute him a trespasser, nor does he thus forfeit his right to exact from the railroad company a reasonable effort to avoid a collision. *Holt v. Pennsylvania R. Co.*, 828.

Unless authorized by legislative grant, the laying of a steam railway longitudinally in a street is a wrongful appropriation thereof, see *Bork v. United N. J. R. & C. Co.* (and note), 727.

STREET INTERSECTION.

The control of a car demanded at a street intersection is such control as will prevent the occurrence of accidents in the absence of negligence on the part of pedestrians or others lawfully using the highway, see *Mauer v. Brooklyn Hts. R. Co.*, 787.

What constitutes, see *Freeman v. Brooklyn Hts. R. Co.*, 779; *Goldkrens v. Metropolitan St. Ry. Co.*, 780; *Mauer v. Brooklyn Hts. R. Co.*, 787.

STREETS. (See *Abutting Owners*; *Additional Servitude*; *Abutting Owners*; *Franchise*; *Municipal Ordinances*.)

DEDICATION OF PUBLIC STREETS; ACCEPTANCE BY MUNICIPALITY.—Private property is platted by the owners showing private streets so laid out are not absolutely dedicated to a public use. Expressly accepted by the proper municipal authorities acceptance the fee of such streets does not vest in the municipality. *Russell v. Chicago & M. Elec. Ry. Co.* (and note), 100.

EXCLUSIVE RIGHT TO USE STREETS.—A municipality cannot take a street railway company the exclusive right to use a street. A street railway company cannot erect in the street an obstruction of the nature of a trestle or embankment which will preclude the use of any portion of it. *Russell v. Chicago & M. Elec. Ry. Co.* (and note), 100.

INJUNCTION RESTRAINING STREET RAILWAY COMPANY FROM USING STREET NOT DEDICATED.—An injunction will lie against a street railway company compelling the removal of its obstructions upon lands not dedicated for street purposes. *Russell v. Chicago & M. Elec. Ry. Co.* (and note), 100.

CONSTRUCTION OF VIADUCT; EXTENSION BEYOND LIMITS OF VILLAGE.—An ordinance authorizing the construction of a superstructure or trestle-work over a village, upon condition that the street railway company dedicate additional lands to be dedicated for street purposes, is authorized. The company is estopped from insisting upon the removal of any superstructure or trestle-work because it extended beyond the limits specified in the ordinance, where such work was done in accordance with the action of the village president and village engineer, but with the knowledge that the company was using more than the limits of the street. *Winnetka, Village of, v. Chicago M. Elec. Ry. Co.*

EJECTMENT AGAINST STREET RAILROAD APPROPRIATING STREET.—The fee of land subject to an easement for a public use cannot be taken by a street railway company. A street railway company is liable to an ejectment against an intruder who wrongfully appropriates land to a purpose wholly foreign to the easement, but his action will be subject to the easement in question. *Bork v. United N. J. R. & C. Co.* (and note), 727.

WRONGFUL USE BY STEAM RAILROAD.—The laying of a steam track in a street, unless by authority of legislative enactment, is a wrongful use. A street railway company implied will be regarded as such an exclusive and wrongful use of that part of the street to a purpose foreign to the public use. A street railway company cannot sustain such action of ejectment by the abutting owner. *Bork v. United N. J. R. & C. Co.* (and note), 727.

Use by street railway an additional burden where fee is in fee.—A street railway company cannot take an additional burden where fee is in fee. *Paige v. Schenectady Ry. Co.*, 768.

STREETS, DEFECTS.

DEFECTS CAUSED BY CONTRACTOR WITH MUNICIPALITY.—Where a contract between a paving company and a municipality requires the contractor to maintain the pavement in repair for a period of five years, a street railroad company is not liable for injuries caused within such period by an opening left by the contractor in the pavement alongside the tracks of the company. *Binner v. City of New York*, 738.

LIABILITY OF STREET RAILWAY COMPANY FOR INJURY TO PEDESTRIAN FALLING OVER CORD STRETCHED ACROSS A TEMPORARY BRIDGE OVER A TRENCH, see *Schivere v. Brooklyn Hts. R. Co.*, 790.

STREETS, PAVING.

AGREEMENT WITH STREET RAILWAY COMPANY TO PAVE STREETS; ULTRA VIRES; SPECIFIC PERFORMANCE.—Under Illinois Rev. Stat., chap. 24, § 63, city councils are vested with the exclusive power to pave, grade, curb, improve, and regulate the streets. A street railway company has no power to enter into an agreement with the owners of property abutting on streets to pave the streets through which its tracks are laid. Such a contract is *ultra vires*, and cannot be specifically enforced. *Farson v. Fogg*, 87.

LIEN FOR PAVING ASSESSMENTS AGAINST STREET RAILWAY.—Where a lien for paving assessments has been ascertained and fixed in favor of a city against a street railway by a decree of court, and such railway is sold under foreclosure of a mortgage executed subsequent to such lien, the purchaser of the property at such sale may redeem from the lien for the paving assessments, and upon such redemption he will be subrogated to the rights of the city in respect to such lien, and will hold the property as against a lien subsequent to that of the mortgage, notwithstanding the fact that the city is the holder of such subsequent lien. *City of Lincoln v. Lincoln St. Ry. Co.*, 634.

EFFECT OF CONTRACT BETWEEN MUNICIPALITY AND PAVEMENT CONTRACTOR.—A contract between a paving company and a municipality to repave a street through which a street railroad is constructed, and to maintain such pavement in repair for a period of five years relieves the railroad company during such period from the obligation of keeping the street in repair as required by the original resolution granting its franchise. *Binner v. City of New York*, 738.

LIABILITY OF COMPANY FOR COST OF REPAVEMENT.—An ordinance requiring a street railway company to pave the parts of the streets on which its tracks were laid, and to pave the whole width of the streets where sidings were laid, does not require the company to pave the entire width at a place where the sidings were removed prior to the time when the repavement was laid. *Shamokin Borough v. Shamokin & Mt. C. Elec. Ry. Co.*, 832.

SUBWAY.

Use of streets for construction of subway not an additional servitude, see *Sears v. Crocker*, 444.

TAXATION.

CONSTITUTIONAL PROVISION.—Provision of California Constitution (art. 13, § 10) as to taxation of railways operated in more than one county not applicable to street railways. *San Francisco & S. M. Elec. Ry. Co. v. Scott* (and note), 36.

REAL PROPERTY OF STREET RAILWAY COMPANY; MUNICIPAL TAX ON GROSS EARNINGS; FIXTURES.—A municipal ordinance providing for the payment to a city of a percentage of the gross earnings of a street railway company and further providing that such company shall pay the city such taxes for municipal purposes as shall be levied or assessed upon the lots and parcels of lands and buildings thereon which are the property of the company, should not be construed so as to exclude from the assessment-rolls for taxation for municipal purposes the machinery used by the company in the operation of its railway by electrical power. *Detroit United Ry. Co. v. Tax Commissioners*, 495.

POWER OF STATE BOARD OF TAX COMMISSIONERS.—The provisions of a municipal charter for the taxation of real and personal property within the city, and that the city assessors shall make copies of the rolls as finally confirmed by the city council, on which they should ratably assess county and State taxes as provided by general law, do not prevent the State from enacting a law requiring the revision of local assessments by a State board of tax commissioners. *Detroit United Ry. Co. v. Tax Commissioners*, 495.

Exemption of power house under general statute relating to taxation of railroad property for municipal purposes, see *City of Philadelphia v. Elec. Tract. Co.*, 862.

Privilege tax on street car advertising, see *Knoxville Tract. Co. v. McMillan*, 879.

TRANSFERS. (See *Ejection of Passenger; Passengers.*)

REQUIRED BY FRANCHISE; ANNEXED TERRITORY.—Where a franchise provides that transfer tickets should be issued free of charge to all passengers requesting the same who boarded its cars at any point upon its line within the limits of the city, and whose destination might be upon any point upon any other line within such limits, it was held that the extension of the boundaries of the city subsequent to the date of the franchise did not affect the duty of the company, and that it was required thereunder to issue transfers to any point within the boundaries of the city, notwithstanding the extension. *Indiana Ry. Co. v. Hoffman*, 193.

RULE REQUIRING PRODUCTION.—Rule requiring production of transfer is reasonable and company is not liable for ejection of passenger for failure

TRANSFERS — (Continued).

to produce it, although passenger was entitled to the issue of such transfer upon the car where he paid his fare. *Crowley v. Fitchburg & L. St. Ry. Co.*, 453.

WRIT OF MANDAMUS.—A peremptory writ of mandamus will not be granted upon the application of a private individual to compel the issue of transfers. *People ex rel. Lehmaier v. Interurban St. Ry. Co.*, 751.

USE OF TRANSFERS ON CONSOLIDATED LINES.—A condition in a franchise requiring the company to give transfer tickets for use on all of its own lines does not require the holder of such franchise to give transfers for use on a line connecting its lines within the city with the lines of another street railway in another city, whose rights had been acquired by the former company, notwithstanding the fact that the franchise of the latter company was granted subject to similar conditions. *City of Montpelier v. Barre & M. Tract. & P. Co.* (and note), 911.

Evidence as to possession of, see *Chicago City Ry. Co. v. Carroll* (and note), 124.

Want of transfer slips by conductor is not a defense to an action on a penalty, see *Rosenberg v. Brooklyn Hts. R. Co.*, 807.

TRESPASSER. (See *Children; Newsboys; Passengers.*)

Newsboy riding on car as trespasser compelled to jump off by threat of conductor; liability for death, see *Chicago City Ry. Co. v. O'Donnell*, 147.

Children riding on street car without permission; liability for injuries caused by being thrown off by jolt of car, see *Monehan v. South Cov. & Cin. St. Ry. Co.* (and note), 312.

Newsboy riding on car, liability for injury, see *Albert v. Boston Elev. Ry. Co.*, 448.

VEHICLES, COLLISION. (See *Evidence; Fright of Horse; Instructions; Look and Listen; Motorman; Ordinary Cars; Speed.*)

AT STREET INTERSECTION.—Plaintiff's intestate drove his wagon from behind a beer wagon which obstructed his view upon the tracks of the defendant at a street intersection and was struck and killed. Evidence held sufficient to submit question of decedent's negligence to the jury. *Chicago City Ry. Co. v. O'Donnell* (and note), 170.

COLLISION AT STREET CROSSING; DUTY TO LOOK AND LISTEN.—Before crossing the tracks the plaintiff looked both ways and saw cars approaching on each track, one at a distance of about a block and the other at a distance of about two blocks. He looked a second time before driving upon the first track, but was struck by a car upon the second track as he drove upon it. It was held that was not contributory negligence as a matter of law to fail to look a second time before reaching the second track, and to endeavor to avoid the car on that track by stopping upon, or attempting to back from the first track. *Chauvin v. Detroit United Ry. Co.*, 478.

VEHICLES, COLLISION — (Continued).

RIGHTS OF, AT STREET INTERSECTION.— It is the duty of a motorman in charge of a car, when approaching an intersecting street, to have his car so far under control that he will not endanger the safety of persons in vehicles driving across the track. *Searles v. Elizabeth, P. & C. J. Ry. Co.* (and note), 706.

Collision at street intersection, see *El Paso Elect. Ry. Co. v. Kendall*, 910.

Driving across track at street intersection in front of a rapidly approaching car about half a block away, see *Goldkrans v. Metropolitan St. Ry. Co.*, 780.

Collision at street intersection; what constitutes street intersection; rule as to equal rights at street intersection, see *Freeman v. Brooklyn Hts. R. Co.*, 779.

MOTORMAN'S DUTY TO STOP CAR.— Evidence considered and held sufficient to justify finding that motorman should have stopped his car in time to prevent collision at street crossing, see *Union Tract. Co. v. Vander Cook*, 231.

NEGLIGENCE INFERRED FROM CIRCUMSTANCES.— Where it appeared that a milkman, while driving his inclosed wagon along the defendant's tracks, was injured by a collision with one of its cars; that he looked back a number of times to see whether a car was approaching; that the speed with which the car approached was excessive, and that there were no obstructions upon the track preventing the motorman from observing the plaintiff's wagon; it was held that the jury might infer from the motorman's failure to exercise reasonable care, that he was negligent. *Indianapolis St. Ry. Co. v. Darnell* (and note), 237.

CONTRIBUTORY NEGLIGENCE; FAILURE TO LOOK BEHIND.— Under the circumstances of the case it was held not contributory negligence for the plaintiff while driving along the defendant's track not to constantly look behind him for approaching cars. He may be presumed to have known that his wagon was plainly visible to the motorman, and that without special circumstances which do not appear, the railway company could only have run him down carelessly or willfully. *Indianapolis St. Ry. Co. v. Darnell* (and note), 237.

CAR TO BE STOPPED AFTER DISCOVERY OF PERILOUS SITUATION.— The negligence of a plaintiff in driving across a street railway track without stopping to look and listen will not excuse the company where its motorman failed to use reasonable diligence to stop the car after discovering the plaintiff's peril. If the motorman's failure to stop the car, after seeing the danger, directly and immediately caused the injury to the plaintiff, the company is liable. *Omaha St. Ry. Co. v. Larson* (and note), 654.

DUTY TO AVOID COLLISION.— An instruction to the effect that if the jury find that the plaintiff was guilty of want of reasonable and ordinary care in attempting to cross the tracks under the circumstances of the case, then he is not entitled to recover, unless they believe that the motorman

VEHICLES, COLLISION — (Continued).

could have avoided the accident by the use of ordinary care, after he saw, or, by the use of ordinary care, might have seen, that the plaintiff was on the track or very near thereto and driving toward the same, and was in danger of being struck by the car, was sustained. *Richmond Pass. & Power Co. v. Gordon*, 936.

Duty of motorman to avoid collision, see *Moran v. Leslie*, 254.

Attempting to cross track in front of approaching car without looking and listening does not preclude recovery where the motorman could have stopped the car in time to avoid collision had it been operated at a proper rate of speed, see *Kolb v. St. Louis Transit Co.*, 611.

Collision with vehicle driven from a driveway upon street car tracks; duty of motorman to avoid collision notwithstanding failure of driver to look, see *Fellenz v. St. Louis & Sub. Ry. Co.*, 620.

WHERE HORSE IS RUNNING AWAY.—When vehicle drawn by horse which is running away is struck by car which could have been stopped in time to avoid collision it is error to give a peremptory instruction to find for the defendant. *Thiel v. South Cov. & Cin. St. Ry. Co.*, 308.

Collision where team was observed to be unmanageable from fright caused by operation of car, see *Wilson v. Chippewa Valley Elec. Ry. Co.*, 979.

CROSSING TRACK; ERROR IN JUDGMENT AS TO DISTANCE.—A person who attempts to cross a track in front of an approaching car in the belief that he will be able to get across before the car could reach the place of crossing cannot recover. *Atlanta Ry. & P. Co. v. Owens*, 78.

SUDDENLY DRIVEN ON TRACK.—Where a person drives a horse and wagon in front of a street car so near the car that it cannot be stopped by the motorman in time to avoid a collision, the street railway company is not liable for the injury. *Chicago Union Tract. Co. v. Browdy* (and note), 138.

LOADED WAGON DRIVEN ACROSS TRACK.—In an action for injuries received in attempting to drive his team, hauling a wagon heavily loaded, across the tracks of the defendant, an instruction that the ordinary care required of the plaintiff in driving across the track was that "care and foresight to avoid danger which a person of ordinary prudence, caution, and intelligence would usually exercise under the same or similar circumstances," was held correct and could not be objected to because of the use of the word "usually." *Chicago Union Tract. Co. v. Chugren* (and note), 190.

FAILURE TO STOP BEFORE DRIVING ON TRACK.—Where at the time the plaintiff attempted to cross no car could be seen or heard, although he could see for a distance of 128 feet up the track, and the car was approaching at a speed of at least forty miles an hour; and the car was more than 250 feet away when he first drove his horse upon the crossing, it was held that the plaintiff's failure to stop before crossing the track was not contributory negligence as a matter of law. *Union Tract. Co. v. Vander Cook*, 231.

VEHICLES, COLLISION — (Continued).

CROSSING IN FRONT OF CAR; CONTRIBUTORY NEGLIGENCE.—The plaintiff, in attempting to drive across the tracks of the defendant at a street intersection, was struck by one of the defendant's cars and thrown from his wagon and injured. It appeared that he was driving down a street which was at a grade of about 3 per cent. His horse approached the crossing at a slow walk. He saw the car approaching at a distance of about 250 feet, but did not stop before going upon the track. It was held that he was guilty of contributory negligence. *Roefeldt v. St. Louis & Sub. Ry. Co.* (and note), 562.

CROSSING TRACK IN FRONT OF APPROACHING CAR; CONTRIBUTORY NEGLIGENCE.—It is for the jury to determine whether a person is guilty of contributory negligence in attempting to cross a track from a distance of twenty-five feet, in front of a street car approaching at about 200 feet distant. *Linder v. St. Louis Transit Co.*, 607.

Contributory negligence in attempting to cross track when driver knew that car was likely to strike him, see *Moran v. Leslie*, 254.

Driving vehicle on track in front of approaching car without looking is contributory negligence, see *Indianapolis St. Ry. Co. v. Marschke*, 256.

Question as to whether plaintiff exercised due care in driving upon crossing in front of an electric car is for jury, see *Dalton v. New York & N. H. R. Co.*, 429.

Stopping on track in front of approaching car is contributory negligence, see *Gettys v. St. Louis Transit Co.*, 614.

Instruction as to right of driver to cross ahead of car held erroneous, see *Binsell v. Interurban St. Ry. Co.*, 781.

Contributory negligence in driving in front of car seen approaching at a distance of ninety-five feet, see *Wilson v. Chippewa Valley Elec. Ry. Co.*, 979.

CONTRIBUTORY NEGLIGENCE.—It is not negligence as a matter of law to stop a buggy so that the rear wheels thereof are within a few feet of a street car track. *Montgomery St. Ry. v. Hastings* (and note), 1.

DUTY TO LOOK AND LISTEN.—It is for the jury to decide whether it was negligence to drive along a track without looking back for an approaching car. So held where the plaintiff's intestate was thrown from his wagon and killed by a collision with a sprinkling car running wild. *Chicago City Ry. Co. v. Barker* (and note), 182.

CONTRIBUTORY NEGLIGENCE OF MINOR.—In determining the question of the contributory negligence of a minor who was driving a vehicle across a track, the rule does not require the same degree of caution as in the case of an adult; the degree of care to be used will depend upon the age and capacity of the minor as determined by the particular circumstances of the case. It cannot be said as a matter of law that a minor of the age of fifteen years has arrived at man's estate, in judgment, prudence, and forethought. *Duboyer v. City & Sub. Ry. Co.*, 819.

VEHICLES, COLLISION — (Continued).

Duty of person driving vehicle along track to look behind for approaching car, see *Twelkemeier v. St. Louis Transit Co.*, 615.

Evidence of plaintiff to the effect that he looked and listened before crossing a track considered and held in conflict with physical facts, see *Barrie v. St. Louis Transit Co.*, 617.

Question of negligence of driver in turning from one track to another to escape a car approaching from the rear is for the jury, see *Pritchard v. Brooklyn Hts. R. Co.*, 782.

Failure to look back while driving along track in night-time is contributory negligence, see *Geleta v. Buffalo & Niagara Falls Elec. Ry. Co.*, 783.

NEGLIGENCE OF DRIVER NOT IMPUTED TO PLAINTIFF.—The plaintiff was riding with his brother, an experienced driver, and while attempting to cross the tracks of the defendant was struck by one of the defendant's cars and injured. An instruction to the effect that if the jury find that the driver was guilty of negligence in the manner in which he drove the horse, which contributed to the accident, the driver's negligence should not be imputed to the plaintiff, was sustained. The driver being one whom the plaintiff knew to be skillful and experienced, the plaintiff was not guilty of contributory negligence in relying on the care of the driver, although he himself took no precaution to avoid the injury. *United Rys. & Elec. Co. v. Biedler* (and note), 391.

IMPUTED NEGLIGENCE.—Instruction to effect that person riding with driver had no right to rely implicitly upon care and prudence of driver, but upon approaching track it was his duty to attempt to have the driver check speed of vehicle to a safe rate, was sustained. *Holden v. Missouri Ry. Co.* (and note), 573.

Duty of motorman to avoid collision with vehicle driven along track; negligence of driver not imputable to person riding with him, see *Baxter v. St. Louis Transit Co.*, 612.

Negligence cannot be imputed to driver of vehicle from the mere fact that he was driving along the track; contributory negligence under such circumstances is for the jury to determine, see *Buren v. St. Louis Transit Co.*, 616.

VIOLATION OF CITY ORDINANCE; PROXIMATE CAUSE OF INJURY.—The plaintiff's horses and wagon were injured by a collision with one of the defendant's street cars. The horses and wagon were standing unhitched in violation of a city ordinance. It was held that such a violation does not preclude recovery for injuries sustained unless such violation was a proximate cause contributing to the injury. *Monroe v. Hartford St. Ry. Co.* (and note), 59.

Collision on a narrow bridge, see *Lockwood v. Troy City Ry. Co.*, 784.

Collision caused by derailment of car, see *Perras v. United Traction Co.*, 784.

Liability of steam railroad company for collision on tracks laid in street, see *Holt v. Pennsylvania R. Co.* (and note), 828.

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VEHICLES, COLLISION — (Continued).

Collision with vehicle crossing track owing to failure
Hanheide v. St. Louis Transit Co., 619.

Collision with vehicle crossing track where car was
rate of speed, see *Moritz v. St. Louis Transit Co.*, 619.

Injury to passenger caused by collision, see *Houston* 1
906.

Passenger injured by collision, see *Frank v. Metropolitan*

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Injury caused by, to newsboy riding on street car as to
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Causing injury to child riding on car without permis-
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